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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 502

UNION LEADER CORPORATION,
PETITIONER,

v.

THE HAVERHILL GAZETTE COMPANY,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit.

Opinions Below

The opinion of the United States Court of Appeals for the First Circuit is not yet reported but is printed in

Appendix A to this petition. The opinion of the United States District Court for the District of Massachusetts is reported at 218 F. Supp. 487. The Report of Special Master Derek Curtis Bok, which was adopted by the District Court, is printed in Vol. I, 176-239, of the Certified Record filed herewith.

Prior opinions in this case are reported at 180 F. Supp. 125, 284 F.2d 582, 365 U.S. 833, 292 F.2d 381 and 368 U.S. 297.

Jurisdiction

The judgment of the Court of Appeals was entered on June 8, 1964. Petitioner's request for rehearing was denied on June 23, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

I. Whether the Court of Appeals, in a private treble damage antitrust action, erred in refusing to accept the facts found by a special master and adopted by the District Court, even though such facts were based almost exclusively upon oral testimony.

II. Whether the Court of Appeals erred by holding that, under collateral estoppel, a finding of a violation of the antitrust laws required a finding of substantial damages in the subsequently tried damages phase of the action.

III. Whether the Court of Appeals erred in relieving respondent of the burden of proving that antitrust law violations of petitioner were a proximate and substantial cause of damage to respondent.

IV. Whether the Court of Appeals erred by permitting respondent to violate the antitrust laws in defense against petitioner's violations and in combining with others to exclude petitioner from a newspaper market to the public detriment.

Statutes Involved

The statutes involved are Sections 1 and 2 of the Sherman Act, 26 Stat. 209, 15 U.S.C. §§1 and 2, and Sections 4, 7 and 16 of the Clayton Act, 38 Stat. 731, 15 U.S.C. §§15, 18 and 26, all of which are set forth in Appendix B to this petition.

Statement of the Case

On January 13, 1959, petitioner, Union Leader Corporation, brought the suit involved herein in the United States District Court for the District of Massachusetts. Named as defendants were the respondent, The Haverhill Gazette Company (Gazette), Newspapers of New England, Inc., (NNE) which had acquired all of the stock of the Gazette and some twenty-five New England newspaper publishers who had organized NNE for the purpose of buying the Gazette. Petitioner complained that the defendants had

violated §§1 and 2 of the Sherman Act to its past and continuing damage. The defendants were charged with combining to monopolize the Haverhill, Massachusetts newspaper market by excluding the competition of the Haverhill Journal (Journal) published by petitioner and further combining to prevent petitioner from publishing newspapers in other New England areas served by the papers of the defendant stockholders of NNE. Additionally, petitioner complained that the business of the Journal was restrained by rate discriminations practiced by the Gazette.[1]

The respondent Gazette filed a counterclaim in which it alleged that petitioner had violated the antitrust laws by rate discriminations practiced by the Journal and by combining with some eight Haverhill merchants to monopolize the Haverhill newspaper market to the exclusion of the Gazette.

The case was assigned for all purposes to the Honorable Charles E. Wyzanski, Jr. Before trial, Judge Wyzanski entered an order separating the issues of liability and injunctive relief from the damage issues, expressly reserving the hearing of "evidence with respect to any issue of damages until each party has had a full opportunity to exhaust his right of appeal with respect to such finding of liability." (IR, Vol. I, 87).[2]

After trial to the District Court without a jury, it entered its findings of fact, conclusions of law and issued an injunction. The District Court dismissed the complaint

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[1] The pleadings in this case were not printed by respondent in the record which it supplied the Court of Appeals and which led to the judgment now appealed from. However, they may be found in the records of this Court in Docket No. 658, October Term, 1960, Vol. I, 8-80.

[2] References to the record in the instant petition are designated R, whereas references to the record in the petition on file as 658, October Term, 1960 are designated IR.

as to NNE and its stockholder defendants. The District Court found that both the Gazette and the Journal had engaged in advertising rate discriminations and had attempted to monopolize the Haverhill market. Accordingly, the District Court ordered both papers to publish advertising rates and to adhere to them. Both parties were also enjoined from attempting to monopolize. Petitioner, Union Leader, was enjoined from continuing its past relationship with the eight Haverhill merchants. (IR, Vol. I, 1101-06).

Upon cross appeals, the Court of Appeals for the First Circuit affirmed the liability finding as to petitioner's conduct, but reversed as to that of the Gazette on its own finding of fact, unsupported by any District Court finding and contradicted by the evidence, that the Gazette acted only in self-defense after the Journal initiated discriminatory rates. (284 F.2d 582).

At this phase of the litigation this liability decision still stands as this Court denied Union Leader's petition for review of the liability judgment of the Court of Appeals. (365 U.S. 833).

At or about this stage of the proceedings, petitioner learned of manifestations of hostility directed against it by the District Judge both in and outside of the courtroom. An affidavit of prejudice was forthwith filed by petitioner and ordered "struck" on the day of filing by the District Judge. The Court of Appeals allowed petitioner's motion for leave to file a petition for a writ of mandamus seeking disqualification of the District Judge. In subsequently refusing to issue the writ, the Court of Appeals criticized the District Court's lack of restraint but concluded that although he may have sounded prejudiced, he really was not. *In re Union Leader Corporation*, 292 F.2d 381, 391, 392. This Court denied Union Leader's petition for a writ of certiorari. (368 U.S. 297). All relevant papers are on

file with the Clerk of this Court as No. 435, October Term, 1961.

The trial of the issues relating to damages had in the meantime been referred to a Special Master, Professor Derek Curtis Bok of Harvard Law School, (Appendix C hereto). As had been previously ordered by the District Court, the Gazette filed schedules of its damages claims with the master. These claims covered alleged loss of fair market value of the Gazette, losses of advertising from the eight merchants associated with the Journal, losses of advertising from a J. M. Fields concern, losses of advertising from certain merchants said to have been improperly influenced by the eight merchants and losses of advertising said to have resulted from advertising discriminations practiced by the Journal. (R, pp. X1-X96).

The master presided over the lengthy trial which occupied some thirty courtroom days at which some sixty witnesses were examined by counsel, and at some length, by the master. Except for the schedules filed by the Gazette, documents constituted a small part of the evidence received by the master.

The master filed a report which found against the Gazette as to all claims except as to the advertising placed exclusively in the Journal by the eight merchants. As to that Gazette claim the master found damages in the amount of $29,441.99 before trebling. The District Court adopted the report of the master, awarded the Gazette costs and counsel fees of $68,000 and entered judgment in its behalf in the amount of $156,325.97. (R. Vol. 1, 603, 604.)

Both parties appealed from the judgment. Petitioner charged as error the refusal of the District Court to permit it to establish that it had been prevented from entering the wider New England market by the Gazette, NNE and NNE members acting in concert. Petitioner also contended that the District Court awarded excessive counsel fees. The

nub of the Gazette's appeal was that the damages allowed were inadequate.

The Court of Appeals dismissed petitioner's appeal but upheld that of the Gazette, reversing the judgment of the District and remanding the case for new damage hearings in the light of its opinion.

Petitioner requested the Court of Appeals to stay its mandate and, when that motion failed, to recall it in order that petitioner might file a petition for a writ of certiorari with this Court before being required to participate in new damage proceedings. The Court of Appeals denied the motion for recall. Upon receipt of the mandate the District Court immediately appointed a new master but before hearings began, the master requested leave to resign because of a conflict of interest. The request was granted by the District Court. Gazette enforced execution for its costs.

In petitioner's application to Mr. Justice Goldberg, the mandate of the Court of Appeals was stayed and petitioner was given until September 15, 1964 to file its petition for writ of certiorari with this Court.

Reasons for Granting the Writ

1 The Court of Appeals Did Not Consider Itself Bound by the Facts Found by the Master and Adopted by the District Court, Even Though Such Facts Were Based Almost Exclusively Upon Oral Testimony.

In a nonjury action tried to a special master, such as the instant case, the District Court is bound by the facts found by the master. This is specifically provided by Rule 53(e)2 of the Federal Rules of Civil Procedure, as follows:

> In an action to be tried without a jury the court *shall* accept the master's findings of fact unless clearly erroneous. [emphasis supplied]

Thus this Court, in *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 689, recognized the integrity of a master's findings of fact, as follows:

> This was purely a factual issue. The master made his findings in this respect through the weighing of conflicting evidence, the judging of the reliability of witnesses and the consideration of the general conduct of the parties to the suit . . . Our examination of the record leads us to acquiesce in these findings since they are supported by substantial evidence and are not clearly erroneous. And the court below correctly held that the District Court erred in failing to accept these findings . . .

If the trial court is thus limited, *a fortiorari*, the Court of Appeals is bound by the master's findings of fact.

The Court of Appeals acknowledged its duty to accept the facts found by the master, but excused itself from doing so on the theory that collateral estoppel bound the master, and he was not free to find the facts, despite the crystal clear order of reference by the District Court to the master to hear "all issues of damages, . . . find the facts."

In reversing the judgment of the District Court based upon the report of the master, the Court of Appeals did so largely on the basis of its disagreement with the master's findings of fact. The Court of Appeals did rule that the master had given insufficient heed to the doctrine of collateral estoppel. We shall deal with that ruling in Point II. However, a fair reading of the rather complex opinion of the Court of Appeals indicates that its action was governed by its own view of what the master should have found as fact from the evidence, mostly testamentary, which the master received.

The Court of Appeals, in its Opinion footnote 8, honestly

indicated that it had "great difficulty in understanding how the master reached" the factual conclusions. It substituted its personal evaluation of the liability findings for the master's evaluation of the evidence.

Nowhere is this disposition of the Court of Appeals more manifest than on page 10 of its opinion. There the Court of Appeals quarreled with the weight which the master gave to conflicting testimony and to the findings which he reached on three separate and important factual issues.

Thus, the Court of Appeals complained that "the master gave more open consideration to Union Leader Corporation's [petitioner's] evidence and the negative aspects of Gazette's than to the more favorable features of Gazette's case." Of course, it was the province and duty of the master to weigh the evidence and to judge the credibility of the witnesses who appeared before him under the order of reference. In discharging that responsibility, the master's report reflects a painstaking consideration of the evidence submitted by both parties. As to what the Court of Appeals calls the attention given by the master to the negative aspects of the Gazette's evidence, that was really the master's acknowledgment that the Gazette had failed to produce evidence on several points.

For example, as to the finding which the master made against the Gazette as to its claim concerning the advertising of J. M. Fields, he stated that "the facts summarized above have not been contradicted" by the Gazette. (R. 201). Again, as to the Gazette's claim that the union's distribution of the Journal shopper damaged it, the master said: "in fact, no evidence has been advanced to show that a single person was struck, let alone influenced, by the way in which the shopper was distributed." The master also called attention to the fact that the Gazette called as witnesses only two of the twenty-five merchants whom it claimed were improperly influenced by eight merchants in collaboration

with petitioner. (R. 213). As to the balance of the twenty-five the Gazette failed to call, the master specifically noted that failure. (R. 222).

Consequently, in considering the "negative aspects" of the Gazette's evidence, the master was merely observing a recognized evidentiary principle. That principle is that where a party fails to call available witnesses whose testimony would presumably be relevant to his claim, his failure supports the inference that their testimony would be unfavorable to him. *Interstate Circuit v. United States*, 306 U.S. 208, 226; *Chicago, M., St. P. & P. Co. v. Slowik* (C.A. 8, 1950) 184 F.2d 920; *Stoumen v. Commissioner of Int. Rev.* (C.A. 3, 1953) 208 F.2d 903.

Immediately following its criticism of the manner in which the master weighed the evidence generally, the Court of Appeals specifically objected to the fact that the master gave weight to the testimony of advertisers who, in the words of the Court of Appeals "could not, or would not, in 1962, recall that they were importuned by union members to use the Journal", but not, continued the Court of Appeals, to the contrary testimony from union representatives offered by the Gazette.

This is a typical instance where the Court of Appeals assumed, and at a considerable disadvantage, the fact finding powers of the trier of fact. The master's discussion of this subject is found at R. Vol. 1, pp. 192-195. It there appears that the Gazette produced not one advertiser who was influenced by a joint solicitation of union representatives and Journal advertising solicitors, in fact only two of the thirty advertisers called to the stand had even been visited by a union member. The rest of the thirty odd advertisers did not remember any union man soliciting advertising. (R. Vol. 1, 194). Two union members testified that some union members had introduced Journal advertisers to some merchants but the master found that their evidence

did not show any effect or results from the visits. (R. Vol. 1, p. 193). Finally, the master called attention to the fact that the Gazette signally failed to call the union participants in the solicitation and the merchants who were claimed to be influenced. (R. Vol. 1, 194). Hence, the conjecture of the Court of Appeals to the contrary notwithstanding, this is a situation where the master's findings were supported by the overwhelming weight of the evidence.

Next the Court of Appeals was offended at the weight which the master gave to the testimony of some thirty advertisers regarding the lack of contact with them by the eight merchants who were paid by Union Leader as consultants. There were admittedly conversations between some of the eight merchants and some other Haverhill merchants. However, the report of the master who heard all of the testimony makes it abundantly clear that, apart from the damages found by the master resulting from the exclusive advertising of the eight merchants in the Journal, no matter what intent was pursued by these eight they did not cause one iota of loss to the Gazette. (R. Vol. I, 212-224).

On that subject, the master noted several significant facts from the testimony which was presented to him. He pointed out that the Gazette saw fit to call only two of the twenty-five merchants who were allegedly influenced in their advertising decisions by visits from any of the eight merchants and by other advertising practices of petitioner. (R. Vol. I, 213, 222). He referred to the fact that petitioner called nine of the group of twenty-five and some twenty other advertisers who advertised almost exclusively in the Gazette. (R. Vol. I, 213). He found that, of the group of twenty not on the Gazette claims list, only one had been contacted by the eight and that one had, despite the contact, continued to give his advertising exclusively to the Gazette. (R. Vol. I, 214). He noted also that, of the eleven who were called from the Gazette's list of twenty-

five, only four remembered any conversations with any of the eight. (R, Vol. I, 214). The master concluded, after considering and weighing the evidence with respect to the four witnesses who were contacted by one of the eight merchants, that such contacts did not influence the newspaper advertising placement of the four to any degree. (R, Vol. I, 214-221). Finally, the master who heard these merchants testify, rejected the Gazette contention that they were unreliable. (R, Vol. 1, 223, 224).

In the face of the total lack of evidence to indicate that the eight merchants influenced other advertisers to patronize the Journal, it seems incredible that the Court of Appeals could have questioned the master's findings on the issue.

On the same subject, the Court of Appeals suggested that the eight merchants did influence other advertisers because the Court contends they were paid to do so and because they were promised more "if the Journal was successful in putting Gazette out of business". The Court ignores the fact that an intention not accompanied by effective action cannot give rise to an award of damages. The report of the master makes it crystal clear that the eight merchants were most ineffectual advertising solicitors—if indeed they solicited at all under the evidence in this case.

It is significant that the District Court which, unlike the Court of Appeals, heard some of the same witnesses as the master, adopted the master's findings. The District Court emphasized a point which the Court of Appeals seems to have overlooked. The District Court said, R. Vol. I, 601:

> Nor is there any warrant for criticising the Master because on certain issues of causation he reached findings which do not square with statements made by this Court and by the Court of Appeals in earlier

phases of this litigation. The Master, compared with us, had a far more comprehensive record of all aspects of causation which were of crucial importance in measuring the substantiality of the effect of Union Leader's wrongs upon Haverhill Gazette as a consequence of those wrongs.

In thus interjecting itself as a trier of fact in place of the master, the Court of Appeals has erroneously departed from the accepted rule that a master's findings must be accepted unless clearly erroneous.

The only logical conclusion for the reason the Court of Appeals ignored the master's findings of fact is that it disagreed with them, not that they were clearly wrong, or not even that they were wrong to any degree!

The Court of Appeals admitted its inability to point out a single erroneous finding of fact, but because of its displeasure with the judgment below, concluded ". . . we find it impossible to separate what findings were infected by error. We accordingly vacate the report in its entirety."

Fairness, law, logic and respect for the firm administration of justice dictate that the judgment based upon the scholarly and comprehensive report of the master adopted by the District Court should prevail over the judgment based on the ambiguous and erroneous opinion of the Court of Appeals.

The Court of Appeals compounded this error, to the prejudice of petitioner, by the manner in which it removed Professor Bok as the master in the case. The Court of Appeals said, as to the reasons for discharging Professor Bok, p. 10:

> . . . One may think one was not really wrong, and hence resist, consciously or otherwise, the new rules, or conversely, lean over backwards. Alternatively, if one

fully accepts the new principles it may be natural to over-emphasize them. . . .

Would not the new trier of fact, aware that the Court of Appeals did not trust a man of Professor Bok's caliber not to resist the "new rules", be more than apt to over-emphasize them?

It seems to us that the Court of Appeals has proceeded to reverse the judgment of the District Court due to a preconceived notion that, because petitioner was, with the Court's approval, enjoined from continuing certain practices, their use prior to the decree's entry must necessarily have caused the Gazette enormous losses. That concept misconstrues the purpose of an injunction which is to prevent future irreparable injury, even in the absence of past harm. *Swift & Co.* v. *United States*, 196 U.S. 375, 396; *Bedford Cut Stone Co.* v. *Journeyman Stone Cutters' Association*, 274 U.S. 37, 54; *Lorain Journal* v. *United States*, 342 U.S. 143, 153. More importantly, the full scale damage trial conducted by the master resulted in a complete refutation of the Court of Appeals views on the facts as to damages.

The intrusion into the fact-finding field by the Court of Appeals in the fashion expressed in its opinion merits reversal of its judgment.

II. The Court of Appeals Misapplied the Doctrine of Collateral Estoppel in Equating Violation of the Law with Impact and Damages.

Before the injunctive or so-called liability phase of the trial started, the District Court entered an order for a separate trial of all issues raised by the pleadings other than the issues of damages. The order also stipulated that if findings of liability were made, the Court would not hear

evidence with respect "to any issue of damages until appeals on the liability findings had been exhausted," (IR, Vol. I, 87).

Thus the parties were assured in advance of that first trial that they need neither advance nor meet evidence as to damages.

At the conclusion of that trial, the District Court entered a partial final decree which, in part, directed the parties to file damages schedules promptly thereafter. (IR, Vol. I, 1104).

In its opinion on the injunctive and liability aspects of the case, the Court of Appeals expressly recognized that the case had come before it "after trial on all issues except damages" and that the District Court had made no finding as to what portion of the Gazette's losses were attributable to the strike as distinguished from the Journal's competition. 284 F.2d 586, fn. 10.

Accordingly, when the master gave consideration to the extent by which he was bound by the fact findings in the original trial, he concluded that, although one District Court finding stood for the proposition that the Gazette had suffered substantial damage at the hands of petitioner, it did not require him to regard petition's wrongful acts as the sole or predominant cause of the Gazette's losses. (R. Vol. I, 178-180). He noted that the finding in question was unsupported by a detailed analysis in the District Court's opinion which was otherwise noted for precision and detail. (R. Vol. I, 179, 180). He buttressed this conclusion by noting the views expressed by the Court of Appeals as to the reservation of the damage issues which we referred to above.

Moreover, the master stated that even if the District Court's findings indicated that petitioner was responsible for the Gazette's losses, he was not bound by them under the doctrine of collateral estoppel. In his view, the only

possible relevance of a damage finding would be to the question of whether the Gazette was justified in resorting to anti-trust violations because it had been injured by petitioner's violations. He dismissed that as a valid consideration inasmuch as the District Court had ruled that the Gazette could not violate the antitrust laws defensively. Even as to the Court of Appeals' contrary ruling that the Gazette could practice price discrimination for protection, he pointed out that the Court of Appeals did not regard a showing of the precise extent of the harm caused by petitioner to be necessary to excuse the Gazette. (R, Vol. I, 180-182).

The master distinguished the decision of this Court in *Partmar Corporation* v. *Paramount Pictures Corporation*, 347 U.S. 89. He did so on the ground that in *Partmar* the prior finding was construed so broadly as to bar a later counterclaim, whereas in this case the prior finding had a limited meaning. As an additional ground for distinction, he stated that the prior finding in *Partmar* was essential to the decision in the earlier proceeding but that here, even if broadly construed, the prior finding was not essential. (R, Vol. I, 182).

In adopting the master's report, the District Court, which had made the earlier findings and which had issued an injunction based thereon, stated that the master was not constrained by prior actions of the District Court and the Court of Appeals. The District Court held that damage issues had been reserved, that the prior judgment determined that the petitioner's invasion of Gazette's rights had caused it some damage, but that nothing in the judgment determined whether particular conduct of petitioner had a substantial or indeed an appreciable effect upon the Gazette. (R, Vol. I, 601, 602).

Upon appeal, however, the Court of Appeals, which had previously acknowledged that damage issues had been re-

served, held that substantial damages to the Gazette by petitioner had to have been shown in the liability trial to justify its earlier holding that the Gazette could violate the antitrust laws in defense against similar violation by petitioner. (App. A, 33).

Thus, the decision of the Court of Appeals completely negated the District Court's reservation of the damage issues, which the Court of Appeals had earlier recognized to be the fact. First the courts below had lulled petitioner into believing that it was excused from resisting damage claims, then it is told that damage claims were being litigated to its disadvantage after all.

Apart from the manifest unfairness of the Court of Appeals' holding, it suffers from other infirmities.

First, the ruling of the Court of Appeals that the Gazette was justified in violating the antitrust laws in self-defense is plain error. It is direclty in conflict with *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons Co.*, 340 U.S. 211, 214. Its underlying basis has been rejected by this Court in other cases. *Sugar Institute* v. *United States*, 297 U.S. 553, 599; *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 220-221; *Fashion Originators' Guild* v. *Federal Trade Commission*, 312 U.S. 457, 467, 468. Hence, even if there was a finding of damage to support the self-defense plea, it was completely irrelevant to any proper issue in the case.

Secondly, the District Court explicitly rejected the self-defense plea. (IR, Vol. I, 1095, 1096). Consequently, the District Court did not have to, and did not, make any finding of damage by petitioner to the Gazette to support a legal conclusion which it declined to reach.

Thirdly, the master found that petitioner had damaged the Gazette to the extent of some $29,000. Although that sum may be considered dwarfed by the Gazette's astronomical claims, it is not exactly insubstantial viewed alone. It would seem, therefore, that the Court of Appeals, with-

out even having had the opportunity of hearing the damages testimony, is sending the case back to a new trier with, for all practical purposes, directions to find damages in excess of $29,000 in order to implement an invalid legal theory.

Finally, and most importantly, the Court of Appeals failed to observe the collateral estoppel doctrine in ruling that the master was bound to follow findings in the liability trial in his determination of damages. The issue of damages was not in issue, was not disputed and was not litigated in the liability trial. It is commonly held that only findings in a first trial which are litigated and essential to its decision are binding on a second trial of the same issues. *Cromwell* v. *County of Sac*, 94 U.S. 351; *Commissioner* v. *Sunnen*, 333 U.S. 591, 597, 598; *Yates* v. *United States*, 354 U.S. 298, 336; *The Evergreens* v. *Nunan* (C.A. 2, 1944) 141 F.2d 927, 929.

In defining collateral estoppel, this Court said in *Yates*: "That doctrine makes conclusive in subsequent proceedings only determinations of fact, and mixed fact and law, that were essential to the decision." In *Evergreens*, Judge Learned Hand said that such a limitation was intended as "a protection, for it means that the issue will be really disputed and that the loser will have put out his best efforts."

In this case, the finding as to damages was not essential to the decision of the first trial, nor was the issue disputed at all because it had been removed from consideration.

Both in reasoning and result, this erroneous ruling of the Court of Appeals is in conflict with the decision of the Court of Appeals for the Ninth Circuit in *E. V. Prentice Machine Co.* v. *Associated Plywood Mills, Inc.*, (1958) 252 F.2d 473, cert. den., 356 U.S. 951. In that case defendant Associated had sent notices to purchasers of the Prentice machines that such machines infringed Associated's pat-

ents and that they would suffer the usual consequences if they persisted in using the machines. Whereupon, Prentice filed suit for a declaratory judgment that the Associated patents were invalid and, in that suit, it prevailed. Prentice next sought counsel fees on the ground that the infringement notices were sent by Associated in bad faith with the intent to cause loss to Prentice. In deciding in favor of Prentice on that issue, the District Court expressly found that Associated's infringement notices had effectively stopped sales of the Prentice machines.

Prentice then filed an action charging that Associated's sending of the infringement notices violated the antitrust laws and injured it in its business. Associated admitted that it had violated the antitrust laws but contended that the losses of Prentice were not due to the infringement notices but to other factors. On conflicting evidence, the District Court held that Prentice had not shown that its losses were due to the Associated notices and that the complaint should be dismissed.

On appeal, Prentice contended that the District Court was bound by the prior findings in the patent suit that the notices had resulted in damages. In rejecting that claim, the Court of Appeals said (477):

> The additional findings to the effect that the objectionable conduct had actually resulted in damage to Prentice were, therefore, not essential to that decision. This being the case, the doctrine of collateral estoppel by judgment does not bind Associated with respect to the prior findings on the question of damages.

The Court of Appeals acknowledged that Prentice had presented some evidence that its losses were caused by wrongful acts of Associated and that the trial court might

have inferred that proper causation had been established. However, it said as to that (479):

> But the trier of fact was not compelled to draw such an inference, where, as here, there was substantial evidence tending to show that the drop in appellant's business was due to other causes.

We submit that the rules announced in *Prentice* were correct and that those followed by the Court of Appeals here were wrong. On the issue of collateral estoppel, in the fetters with which it has restrained the trier of fact in determining damages, the Court of Appeals has committed prejudicial error.

III. The Court of Appeals Wrongfully Excused Respondent Gazette from the Burden of Showing by a Preponderance of the Evidence that Illegal Acts of Petitioner Union Leader Resulted in an Impact on Gazette which Caused Related Damage.

One of the reasons which may have moved the Court of Appeals to vacate the judgment of the District Court is its apparent belief that the master may have imposed too stiff a burden of proof upon the Gazette. We say "may have moved" advisedly because from the tentative character of its opinion, it is impossible to tell the precise point or points upon which the Court of Appeals based its reversal.[3] However, the Court of Appeals made reference to the fact that the master had used the phrases "sole or predominant cause" and "a more substantial cause of harm than any other known cause." The Court of Appeals ac-

[3] For example the Court of Appeals stated that: "Because of several of the matters discussed herein we find it impossible to separate what findings were infected by error." (App. A, 41).

knowledged that the master used these phrases in connection with only one Gazette claim and that he reached the proper conclusion with respect to that claim, but it suggested that the master might have used the same standard with respect to all Gazette claims. Therefore, the Court of Appeals concluded that the master had used the test of "most substantial" rather than "substantial." (App. A, p. 38).

Passing the sheer speculation to which the Court of Appeals resorted to read the mind of the master, the plain fact is that the master's report shows that the Gazette did not meet the most minimum test in attempting to prove that unlawful acts of Union Leader caused its losses, except in the case of the advertising of the eight merchants where the master found for the Gazette.

Thus with respect to the claim that joint solicitation of advertisers by the union and the Journal, the master found from the evidence which he fully reviewed "that the fact of damage has not in any sense been established." (R, Vol. I, 195). As to the J. M. Fields advertising, the master stated that the facts which he summarized had "not been contradicted" by the Gazette. (R, Vol I, 201). On the question of whether the eight merchants had in fact obtained advertising for the Journal, the master's report shows that the Gazette did not produce a single advertiser to testify that he had been influenced by such solicitation and therefore the master stated that he could not find "improper influence in the case of such of these advertisers as were contacted by members of the eight." (R, Vol. I, 212-223). Similarly, where the Gazette failed to produce testimony that the subsequent advertising of merchants who had received discriminatory benefits from the Journal and the advertising statistics belied such influence the master stated that he could not "but conclude that the wrongful acts of

ULC had no effect upon the advertising of these merchants." (R, Vol. I, 212-222).

This then is not a case where the master imposed an undue burden on the Gazette in measuring the dollar amount of its damages after the fact of damage had been shown. It is not within the ambit of the statement of this Court in *Bigelow* v. *RKO Radio Pictures*, 327 U.S. 251, 264, 265, that the trier of fact "may make a just and reasonable estimate of the damage based upon relevant data, and render its verdict accordingly." The master's report raised no issue as to the manner in which the Gazette measured its damages, except to an insignificant extent on that claim where the master awarded damages to the Gazette.

This rather is a case where the Gazette failed to establish causation between its losses and unlawful acts of petitioner. The evidence which the Gazette produced to prove such causation was at best insubstantial—if not entirely ephemeral. Thus, the Gazette failed to meet the requirements of establishing that its losses were the "certain result of the wrong" as announced by this Court in *Story Parchment Co.* v. *Paterson Co.*, 282 U.S. 555, 562. While an antitrust plaintiff may have great latitude in proving the *amount* of his damages, he is held to the duty of proving the *fact* of damage flowing from unlawful acts of the defendant with reasonable certainty. *Flintkote Co.* v. *Lysfyord* (C.A. 9, 1957) 246 F.2d 368, 392, cert. den. 355 U.S. 835.

Lest this Court speculate that if the Gazette's losses were not due to unlawful acts of petitioner how did they arise, we hasten to add that there were other causes. Thus the District Court found as a fact that the Haverhill community could not profitably support both the Gazette and the Journal even in the absence of illegal actions. (R, Vol. I, 1069). In its opinion in the first case, the Court of Appeals recognized that the strike at the Gazette could well have been as much the cause of the Gazette's losses as

the competition of the Journal. (284 F.2d 582, 586).[4] Furthermore, there was considerable question as to the capacity of the Gazette's management before it was purchased by NNE. Although the master refused to comment on the old Gazette management, he pointed out that the improvement in the Gazette after the change in ownership may have been brought about by the new management rather than by petitioner's cessation of unlawful acts. (R, Vol. I, 232). There was uncontradicted testimony at the damage hearings from Gazette representatives that the Gazette suffered from mismanagement and poor public relations from the time of the Journal's entry into Haverhill until the Gazette was taken over by NNE. (R, Vol. III, 1315-1324; 1376-7, 1415).

In suggesting probable causes of the Gazette's losses, we do not concede any obligation on the part of petitioner to explain them. Petitioner's only responsibility is to defend the claim that its unlawful acts were a substantial cause of them. The master, who received the evidence, found that petitioner had discharged that responsibility except as to one claim.

In summary, the Court of Appeals, while paying lip service to the rule that the Gazette had to show that petitioner's unlawful conduct was a substantial cause of its losses, in fact held the Gazette to a much less stringent standard. In view of the master's report which showed that the Gazette had not met the "substantial" test, the Court of Appeals has for all practical purposes allowed

[4] It is of more than passing interest that Judge Aldrich who wrote this opinion of the Court of Appeals had previously had occasion to pass on the same strike as a District Judge in *N.L.R.B.* v. *I.T.U.* In that case at 161 F. Supp. 431, 432, he enjoined the union from insisting on certain conditions to collective bargaining and, as a basis therefor, he found that the union had caused irreparable injury to the Gazette. There he found that the Journal was by no means fully responsible for the Gazette's ills and he noted also that newspapers were unable to withstand much direct competition.

the Gazette to establish its claims by a mere scintella of evidence. This was error. The judgment of the District Court based upon the master's report should have been affirmed.

IV. The Original Finding of Liability Against Union Leader Was Entered and Affirmed by Courts Allegedly Biased Against Petitioner and Its Principal Officer, and It Was Predicated on Nonexistent Evidence and an Incorrect Principle of Law Which Has Been Specifically Rejected by This Court.

Petitioner assumes that its petition for a writ of certiorari in No. 658, October Term, 1960 was denied because the posture of the entire case was not then ripe for appeal. The Court of Appeals indicates in its Opinion on damages that the prior decree on liability was interlocutory. (App. A, p. 32)

Even if the posture is not now ripe, the judicial history of this litigation, in which petitioner has yet to receive that equal justice under the law to which all are entitled, dictates that this Court at this time intervene and determine the real issue.

In the prior petition (No. 658, October Term, 1960, pp. 2, 3) Union Leader raised the issue as to whether a syndicate of some twenty-two newspapers could legally combine to prevent Union Leader's Journal from gaining entrance into Haverhill against the Gazette, an existing monopoly newspaper, where part of their motives were to protect their existing monopolies in other New England cities and where their Haverhill practices violated the antitrust laws.

The Court of Appeals ignored their intent to monopolize and excused their acts of monopolization as defensive against similar acts. The Court of Appeals ignored the evidence which showed that the Gazette initiated price dis-

criminations, and found on its own that the Journal had initiated them. (Petition in No. 658, October Term, 1960, pp. 6, 7).

Not only did the Court of Appeals put the shoe on the other foot, it then ignored the clear holdings of this Court that one cannot take the law into his own hands and violate the antitrust laws in defense against another violator. Both public and private enforcement through the Courts are available. Any other rule, such as that set by the Court of Appeals, would lead to lawless retaliation.

In the supervisory capacity of this Court over the administration of justice, this Court should review the entire case. It involves freedom of newspaper competition, now vanishing to the point of extinction, and is thus a case of great public importance.

Conclusion

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals

For the First Circuit

No. 6175.

THE HAVERHILL GAZETTE COMPANY,

APPELLANT,

v.

UNION LEADER CORPORATION,

APPELLEE;

No. 6191.

UNION LEADER CORPORATION,

APPELLANT,

v.

THE HAVERHILL GAZETTE COMPANY,

APPELLEE.

APPEALS FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

[218 F. Supp. 487]

[218 F. Supp. 490]

Before HARTIGAN and ALDRICH, *Circuit Judges*,
and GIGNOUX, *District Judge*.

Robert H. Goldman, with whom *Frank Goldman*, *Joseph F. Bacigalupo*, and *Goldman, Golaman & Curtis* were on brief, for The Haverhill Gazette Company.

James M. Malloy and *Ralph Warren Sullivan*, with whom *Malloy, Sullivan & Sullivan* was on brief, for Union Leader Corporation.

OPINION OF THE COURT

June 8, 1964.

ALDRICH, *Circuit Judge*. These cross-appeals by the Haverhill Gazette Company (Gazette) and Union Leader

Corporation (ULCo) from a final judgment in Gazette's favor following the confirmation of a master's report mark the third time this case has been before us. In *Union Leader Corp.* v. *Newspapers of New England, Inc.*, 1 Cir., 1960, 284 F.2d 582, *cert. den.* 365 U.S. 833, we affirmed a decree granting an injunction against ULCo forbidding certain conduct in violation of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1, 2, but vacated the decree insofar as it granted relief in ULCo's favor. In *In the Matter of Union Leader Corp.*, 1 Cir., 1961, 292 F.2d 381, *cert. den.* 368 U.S. 927, we affirmed the action of the district judge in charge of the case in refusing to disqualify himself in response to an affidavit of prejudice. Following this the district court referred the suit to a special master for a determination of the damages caused Gazette by ULCo's wrongful conduct. The master found single damages in the amount of $29,442. The court overruled Gazette's objections to the report and entered a judgment in Gazette's favor for $88,326 (the trebled amount) together with $60,000 as statutory attorneys' fees and $8,000 expenses. Gazette's appeal alleges the damage findings to have been grossly inadequate. ULCo appeals from the award of counsel fees. It also objects to the failure of the court to consider one of the grounds on which it claims that Gazette, or more exactly the purchaser of all of Gazette's common stock, Newspapers of New England, Inc.,[1] and others, were themselves guilty of violating sections 1 and 2 of the Sherman Act, and section 7 of the Clayton Act, 15 U.S.C. §18. This opinion will be concerned only with Gazette's appeal.[2]

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[1] Since renamed Haverhill Publishing Co., Inc.

[2] In view of our present disposition, the size of the award of counsel fees becomes moot, as doubtless the court will wish to reconsider that matter at a later date under the new circumstances. With respect to ULCo's contention as appellant on the merits, this is something that, so far as this litigation is concerned, should have been presented on the original appeal from a judgment, finding no liability and denying relief

The facts, many of which were recited in detail in our first opinion, will be referred to in part as we proceed. The basic fact we now start with is that Gazette entered the damage hearing with comprehensive findings in its favor indicating serious and continuous illegal activity of many sorts by ULCo over a period of years, and "stupendous losses," whether or not as a result of ULCo's wrongdoing, and wound up with a finding of damages in an amount of comparative insignificance.[3] Gazette contends, inter alia, that this resulted from the master's erroneously "compartmentalizing" the issues, citing *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 1962, 370 U.S. 690, and placing too severe a burden upon it as to each item and, further, by disregarding the findings of the district court. ULCo, on the other hand, takes the position that the findings of the master are to be accepted unless plainly wrong, and that they were not.

Because it has an important bearing on precisely what was before the master and the scope of the inquiry open to him, we must consider the prior proceedings with some particularity. At the time of the referral the posture of the case was superficially usual, but actually highly unusual. The issues initially tried to the court were stipulated to be "every issue pertinent to the granting or refusing of an injunction," and "every issue of liability." The trial,

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as to the relevant separate claims, which was specifically stated by the district court, upon the determinations required by F.R.Civ.P. 54(b), to be final. *Cf. Sears, Roebuck & Co.* v. *Mackey*, 1956, 351 U.S. 427; *Cold Metal Process Co.* v. *United Eng'r & Foundry Co.*, 1956, 351 U.S. 445; *Bendix Aviation Corp.* v. *Glass*, 3 Cir., 1952, 195 F.2d 267. We do observe, however, that ULCo's brief appears to rest upon a misconception of the district court's pretrial statement. The court did not say that "any evidence proferred as to an outside market would be excluded," but merely indicated that it was "probable" that it would regard such evidence as unnecessary. This was not a ruling on which one could base rights. We will not now consider whether the matter in question was as fully tried out as it could have been.

[3] ULCo's brief describes it as "relatively microscopic."

exclusive of substantial preliminaries, lasted two weeks. It resulted in an opinion containing a comprehensive summary of findings, pursuant to which the court entered a "Partial Final Decree." Consistent with the stipulation the decree recited,

> "11. Pursuant to Rule 54 of the Federal Rules of Civil Procedure, 28 U.S.C., this Court expressly determines that there is no just reason for delay in entering final judgments on the following claims:
>
> . . . .
>
> all claims for injunctive and declaratory relief. . . ."

It thereupon entered "final judgments" with respect to all paragraphs of its order except the reserved damage claims. It added,

> "However, if an appellate court should regard these orders not as final but as interlocutory, and if the parties would not have the benefit of the appeals available under 28 U.S.C. §1292 (a)(1), this Court, in accordance with 28 U.S.C. §1292(b), is of the opinion that the orders in paragraphs 1, 2, 3, 4, 5, 8, 9, 10, and 11 involve a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation."

Our first opinion did not discuss the question whether, or to what extent, the partial decree was final or interlocutory. In its order of reference, following our affirmance, the district court stated, "The only issues now being left for adjudication relate to damages. These are precisely analogous to issues of damages which would be raised in patent, copyright, and like cases following an appellate adjudication on issues of liability. Such cases are customarily referred to a Master for the ascertainment of damages."

It is here that the difficulties, and they are serious, commence. Except for the sometime question of increasing the damages because of the nature of the infringement, 35 U.S.C. §284 (a matter the statute reserves exclusively for the court in all cases), the issues of patent infringement and damages are separate and clear-cut. Although ascertainment of damages may involve difficult questions of apportionment, see, *e.g.*, *Gotham Silk Hosiery Co.* v. *Artcraft Silk Hosiery Mills, Inc.*, 3 Cir., 1945, 147 F.2d 209, *cert. den.* 293 U.S. 595, there is no overlapping of the issues determined by the court, finally, 28 U.S.C. §1292(a)(4), and those referred. In a private antitrust action liability and damages are not separate. Granting that an injunction may require a finding of merely threatened loss, 15 U.S.C. §26, a partial decree on all issues of liability, however considered, implies much more. One cannot think of private liability for violation of the antitrust laws except in terms of impact and damage.[4] See, *e.g.*, *Stearns* v. *Tinker & Rasor*, 9 Cir., 1958, 252 F.2d 589, 605-06, *cert. den.* 350 U.S. 830; *Freedman* v. *Philadelphia Terminals Auction Co.*, 3 Cir., 1962, 301 F.2d 830, *cert. den.* 371 U.S. 829; *Foster & Kleister Co.* v. *Special Site Sign Co.*, 9 Cir., 1936, 85 F.2d 742, 750, *cert. den.* 299 U.S. 613; *Glenn Coal Co.* v. *Dickinson Fuel Co.*, 4 Cir., 1934, 72 F.2d 885, 887. Indeed, the district court itself, in its opinion confirming the report, stated that its original judgment had "determined" that ULCo's "invasion [of Gazette's rights] caused Haverhill Gazette to suffer damages." The master at one point had recognized this determination, stating that a certain finding "embodie[d] a conclusion by the District Judge that the wrong-

[4] "[A]ny person who shall be *injured* in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . ." Clayton Act §4, 15 U.S.C. §15 (ital. suppl.). Private antitrust actions are not founded upon showing of unlawful conduct only, but upon injuries, to the protected interests, which are the legal result of the overt illegal acts.

ful acts of ULC inflicted some substantial damage upon the Gazette." Yet although this was what the master said the court had found, and what the court agreed it had found, we discover that in its original opinion the court said that it was "not concerned with the assessment of damages, if any." The master, with similar ambivalence, stated that the reference permitted him full latitude to determine "the precise nature and scope of the damage," and a careful study of his report reveals that this meant to him, too, "damage, if any."[5]

Thus we have the situation of the district court's entering not merely a permanent injunction, but a decree of liability which it labelled final, following an apparent finding of damage which, legally, would seem a necessary prerequisite. Yet at the same time the master was thought free to find the damage, *if any*, untrammelled by what went before to the point, as the court put it in its opinion confirming the report, of making an "independent and fresh appraisal on factual issues of causation and damages." Indeed, so "independent" was the master that the court held that while "he reached findings which do not square with statements made by this Court and by the Court of Appeals," his findings must be accepted unless "clearly erroneous."

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[5] There were three principal matters involved in the court's decree; the improper use of union representatives in connection with calls by ULCo's advertising solicitors in which advertisers were urged to boycott the Gazette; secret rate and other advertising discriminations, and illegal contracts with the eight merchants, so-called, by which the merchants were to give all of their advertising to the Journal and were, posing as ostensibly disinterested parties, to boost the Journal and disparage the Gazette and persuade other businessmen to advertise exclusively in the former. The master found no damages whatever as a result of the first two illegal activities, and none with respect to the eight merchants except as to their own exclusive use of the Journal. Even as to this last the master carefully examined the evidence and indicated no awareness of any obligation, as the result of the court's prior findings, to find "substantial damages," or even any damages. We will deal with these matters later at more length.

However, there had become applicable, if the decree of liability is to be considered final, the principle of collateral estoppel, *Partmar Corp.* v. *Paramount Pictures Theatres Corp.*, 1954, 347 U.S. 89, making, in effect, conclusive as between the parties the "essential," *Yates* v. *United States*, 1957, 354 U.S. 298, 336, prior findings. *The Evergreens* v. *Nunan*, 2 Cir., 1944, 141 F.2d 927, 65 Harv.L.Rev. 818, 842-43.

Enough has been said to demonstrate that at least insofar as the court's partial decree is regarded as final there are serious internal conflicts. While aspects of the decree must be accorded finality we think it preferrable under the circumstances to consider the decree of liability as merely interlocutory. This is the usual rule when liability is determined separately; a decree of liability which excludes damages is normally not a final decision. *The Palmyra*, 1825, 10 Wheat. 502; *Craighead* v. *Wilson*, 1855, 18 How. 199; *McGourkey* v. *Toledo & Ohio C. Ry.*, 1892, 146 U.S. 536; 6 Moore, Federal Practice ¶54.13 at p. 125 (2d ed. 1953); Restatement, Judgments §41 (comment a) (1942); *cf.* F.R.Civ.P. 56(c) expressly recognizing a summary judgment of liability alone as interlocutory. The Rule 54(b) certification, which was effective to make appealable under 28 U.S.C. §1291 the court's decision on claims finally disposed of, could not affect the interlocutory character of the partial disposition of the treble-damage claim.[6] See *Sears, Roebuck & Co.* v. *Mackey*, 1956, 351 U.S. 427, 435, 437; 6 Moore, *op. cit. supra*, ¶54.30[1], at p. 232 n.12.

On an interlocutory basis the court's findings as to damages, whether express or implicit, are subject to revision.

[6] That the judgment disposed of all issues on separate trial under F.R.Civ.P. 42(b) would, of course, affect neither finality nor appealability, *Atkins, Kroll (Guam), Ltd.* v. *Cabrera*, 9 Cir., 1960, 277 F.2d 922. We find it unnecessary to determine whether our jurisdiction on the prior appeal to review the decisions of liability was based upon 28 U.S.C. §1292(b), or upon the broad principle recognized in *Smith* v. *Vulcan Iron Works*, 1897, 165 U.S. 518.

However, as to one issue there has been a final judgment, and with respect thereto collateral estoppel must apply. Our decision on the first appeal ordering ULCo's complaint dismissed was upon the ground that the district court's finding of substantial advertising discriminations, dealt with on proper principles, amounted, on the court's subsidiary findings, to legal justification for defensive retaliation in kind by Gazette. This dismissal constituted, inescapably, a final judgment, *cf. Smith* v. *Vulcan Iron Works*, 1897, 165 U.S. 518, and ULCo stands bound by the essential underlying factual determination. At the outset of his report, after discussing this issue, the master correctly concluded that with respect to discriminations the record stood that "the wrongful acts of ULC inflicted some substantial damage upon the Gazette." However, seemingly because of an interpretation which we could not agree with [7] he concluded that collateral estoppel was inapplicable, and that *Partmar* was "disposé[d] of." We can not agree. The finding of substantial damage done to Gazette by ULCo's acts of discrimination was essential to the judgment dismissing ULCo's original action. This finding must remain for all purposes of the case. The dollar amount, of course, was not found, or even that this damage was ascertainable in dollars, but that is something else.[8]

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[7] The master felt that although there was a finding that damage was "inflicted" upon Gazette, this was not a finding "that ULC's wrongful acts were the sole cause or even the predominant cause of injury." Passing the question of just what injury this meant, and whether it expressed a proper standard of causation, a matter considered more broadly *infra*, it cannot be that the court's finding of substantial harm to Gazette as a result of ULCo's discriminations meant harm for which ULCo was not legally responsible.

[8] We might say, in passing, that quite apart from the binding effect of the court's finding that Gazette was injured by ULCo's discriminatory conduct, we have great difficulty in understanding how the master reached his contrary factual conclusion. To take, as one example, the J.M. Fields matter, which the court has described as "most important," and a "serious discrimination," this involved, in part, a discriminatory

Although we conclude that with respect to ULCo's other illegal activities the master was free to find facts overriding the court's decree of liability construed as interlocutory only,[9] it does not follow that the present report in this regard is to be accepted. In the first place, we do not agree that the "clearly erroneous" rule applies uniquely to the master's findings. Rather, the prior findings of the court were themselves entitled to consideration, and there was a burden on the master to be met before finding as to any issue embraced in or underlying the earlier decree, even though interlocutory, that the court was wrong, a burden which neither he, nor the court subsequently, recognized.[10] Furthermore, we find it difficult to agree with the court in its opinion confirming the report that the master had not

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guarantee not to raise the rate for two years, which the master found was "a substantial factor" in taking the business from Gazette. The master nevertheless found no damage, not merely that he could not measure it. As an "important" reason the master referred to the fact that the guarantee was never exercised. We do not follow the reasoning, and without going into details, we do not understand the findings. We would ask, *inter alia*, what was ULCo's point, on the master's analysis, of giving the guarantee at all?

[9] There are a number of circumstances, notably the reception of new evidence, under which our affirmance of the interlocutory decree would not constitute a bar to redetermination of the question of liability in the court below. See, *e.g.*, *Toucey* v. *New York Life Ins. Co.*, 8 Cir., 1940, 112 F.2d 927, 928, *rev'd on other grounds*, 314 U.S. 118; *Western Fire Ins. Co.* v. *University City*, 8 Cir., 1942, 124 F.2d 698; *cf. Alexander* v. *Nash-Kelvinator Corp.*, 2 Cir., 1959, 271 F.2d 524, 526.

[10] One of the fundamental difficulties in this case, which we do not fully reach because the parties did not question the propriety of reference vel non, is the extent to which the master, as a different trier sitting on the damage hearings, not only could take new evidence, but could give different weight to evidence or make very different findings of credibility. Where the issues are to some extent interwoven or overlapping in such separate proceedings this may cause grave difficulties. See, *e.g.*, *Gasoline Prods. Co.* v. *Champlin Ref. Co.*, 1931, 283 U.S. 494, and *United Air Lines, Inc.* v. *Wiener*, 9 Cir., 1961, 286 F.2d 302, *cert. den.* 366 U.S. 924 (involving, additionally, questions of right to jury trial). Under present circumstances we adopt the rule above stated.

been unduly hard to convince. By this we mean that we are not satisfied that he did not charge himself erroneously. Certainly he did not vocalize our caveat in *Momand* v. *Universal Film Exchanges, Inc.*, 1 Cir., 1948, 172 F.2d 37, at 43, 42, *cert. den.* 336 U.S. 967, that while "a fair degree of certainty is still essential to show the causative relation of defendant's misconduct and plaintiff's injury," yet "in an antitrust suit, covering as it must many imponderables, rigid standards of precise proof would make a plaintiff's task practically hopeless." It is more than arguable that he did not apply it. At the least it can be said that in discussing the evidence the master gave more open consideration to ULCo's evidence and the negative aspects of Gazette's than to the more favorable features of Gazette's case. The fact, for example, that various advertisers could not, or would not, in 1962, recall that they were importuned by union members to use the Journal and not the Gazette, received much attention, and the contrary testimony of the representatives none. Similarly, the advertisers' testimony regarding lack of contact by the eight merchants, so-called, whom the court found Loeb illegally and "immorally" hired to act as apparently disinterested solicitors, was emphasized to the extent of not even referring to the testimony of some of the merchants themselves that for a period of nearly twenty months they spent, individually, up to forty hours a week making such contacts.[11] Nor did the master deal with the likelihood that the eight merchants did exactly what they said they did, not merely because they were paid, collectively, some $30,000 by Loeb for so doing, but because they were promised $1,000,000 and a quarter interest in the Journal if the Journal was successful in putting Gazette out of business. This truly extraordi-

[11] We do not think it necessary to distinguish to what extent the merchants may have "talked-up" the Journal as opposed to soliciting specific advertising or obtaining actual contracts.

nary contract, and what might seem to be inevitable consequences, was dismissed in silence as the master concluded that (beyond effects on advertising of their own enterprises) the merchants' activities were so inconsequential as not to produce a single dollar.[12] While there is no obligation to discuss all of the evidence, *cf. United States* v. *Yellow Cab Co.*, 1949, 338 U.S. 338, 340-42, in total this was a substantial omission, particularly in the light of what had apparently been previously credited by the court. It is also relevant in view of our doubts as to the burden the master placed upon Gazette.

These other doubts take form because of the master's frequent use of the phrases "sole or predominant cause," and "a more substantial cause of harm than any other known cause." While he did this only in connection with rejecting, at the outset of his report, Gazette's interpretation of one particular statement in the court's opinion, and the master's ultimate conclusion was correct,[13] his use of and reliance upon this standard of causation was wrong. The fact that he never enunciated another strongly suggests that he may have employed the same standard throughout his report.

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[12] No mention, either, was made of the court's finding that the result of this contract was "to intensify . . . zeal . . . to support The Journal by securing advertising for it and to discourage advertising in The Gazette by . . . enterprises subject to their influence," and Loeb's significant testimony. "XQ. And they assured you they would get as much advertising business for you as they possibly could, didn't they? A. Yes. XQ. And they did that, didn't they? A. Yes." If in this vital matter Loeb was not merely misled, but totally mistaken, we think it was at least incumbent on the master to explain his mistake.

[13] The court had stated that Gazette "had been put in peril of insolvency in the equity sense as a result of ULC's attempt to monopolize." Gazette endlessly seeks to magnify this. While, conceivably, the court's language was inexact, it is obvious that ULCo was not the sole cause of Gazette's difficulties, and that Gazette's construction is not only inconsistent with the facts, but with the entire balance of the court's opinion.

In using this standard the master purported to rely upon the decision of the district court in *Momand* v. *Universal Film Exchanges, Inc.*, D.Mass., 1948, 72 F. Supp. 469, noting that the judgment had been affirmed. He failed to note, however, that "sole or predominant" was not the rule that we stated on the appeal.[14] Judge Goodrich, speaking for the court, returned to the Restatement and said, 172 F.2d at 43, "[T]he usual rule in tort is that a plaintiff may recover for loss to which defendant's wrongful conduct substantially contributed, notwithstanding that other factors contributed also. Restatement, Torts § 431 (1934)." The difference between a "substantial" cause and one "more substantial than any other" is manifest. If the master put a burden on Gazette, as it may well be he did, to eliminate all proper causes for the shifting of advertising from Gazette to the Journal to the extent of affirmatively showing that the illegal causes were the sole or most substantial, we consider this too favorable treatment of a deliberate wrongdoer. If anything is clear in this case it is that the Gazette's union difficulties in a strongly union area were what furnished ULC'o the opportunity to initiate and continue the Journal.[15] From the outset it capitalized upon this by illegal means, purposely and effectively designed to take advertising from the Gazette. After the strike was settled (and passing the question of whether ULC'o's con-

[14] It is perhaps not altogether clear what the district court held. It is true that it did use the second of the two phrases quoted *supra*. However, the opinion began with a reference to section 912 of the Restatement of Torts to the effect that what was required "was proof that the tortious conduct was a substantial factor in causing such harm," 72 F.Supp. at 478, a much lesser requirement. Elsewhere the court stated that "if segregation and admeasurement of cause of loss were impossible" (seemingly apposite, on the master's opinion, to the case at bar, see *infra*) various phrases might be used to define the burden of showing causality, including "preponderant," "dominant," "main," or "a substantial," and that it would not "try to decide which of the quoted phrases is correct . . . ."

[15] See fn. 17, *infra*.

duct may not have extended the date) ULC'o engaged in massive illegal assaults upon Gazette's advertisers, discussed *supra*, which were considered, in ULC'o's opinion, at least, of such extraordinary value. Certainly they, too, were expressly designed to accomplish exactly the losses which Gazette in fact suffered. For ULC'o thereafter to be able to say, "Prove exactly what you lost and that it would not have been lost, anyway," would be to admit to a legal ineffectiveness that we should regret to contemplate. In our opinion it is enough to warrant the master in finding general damages that Gazette should show merely a substantial cause, rather than a cause more substantial than any other.[16] While the master considered finding general damages, and declined to do so, we cannot tell under what circumstances he contemplated it, and the burden he imposed upon Gazette. His reference to the principle enunciated in *Bigelow* v. *R.K.O. Radio Pictures, Inc.*, 1946, 327 U.S. 251; that the risk of uncertainty should fall upon the wrongdoer, had attached to it the condition that "the difficulties of proof [must be] . . . the result of ULC'o's unlawful

[16] "The degree of certainty required of a plaintiff in proving causation of damage . . . varies with the nature of the case." *Momand* v. *Universal Film Exchange*, *supra*, 172 F.2d at 42; see Note, The Requirement of Certainty in the Proof of Lost Profits, 64 Harv. L. Rev. 317, 319 (1950). A degree of uncertainty may always be permitted, especially when the circumstances make it particularly likely that the claimant suffered loss at the wrongdoer's hands. *Cf. Bigelow* v. *R.K.O. Radio Pictures, Inc.*, 1946, 327 U.S. 251; Clark, The Treble Damage Bonanza: New Doctrines of Damages in Private Antitrust Suits, 52 Mich. L. Rev. 363, 367-93 (1954); Note, Antitrust Enforcement by Private Parties: Analysis of Developments in the Treble Damage Suit, 61 Yale L.J. 1010, 1016-19, 1025-26 (1952). In the antitrust case at bar uncertainty of cause is much less than it would be in the ordinary multi competitor situation because until the Journal appeared in this admittedly one-newspaper area Gazette had no competition, and if the Journal had ceased publication it would have reverted to that status. In a very arguable sense whatever the Journal took, particularly after the strike ended, Gazette lost. This is, in other words, a harsh case in which to conclude, after proof of substantial violations of the antitrust laws directed at the claimant, that there was an

acts," (which he found they were not). Particularly in the sense that he used it, this was a far too narrow reading of *Bigelow*.

We turn, finally, to Gazette's largest claim, that ULCo is responsible for all losses caused by the Journal's very existence because the Journal was founded upon, and continued in, unlawful conduct of a most substantial nature. The master recognized this as a valid issue and defined it at the outset of the report.

> "[I]t is conceivable that ULC would not have entered the Haverhill market, or remained there throughout the damage period, *had it not enjoyed the benefit of its own wrongdoing*. This possibility must be explored in order to make a thorough assessment of damages, for the early departure of the Journal from Haverhill would have materially improved the position of the Gazette." (Ital. suppl.)

It must be clear that whether any particular unlawful conduct was instrumental in causing the Journal to enter or remain in Haverhill must be determined by the effect that it had upon Loeb, ULCo's president and policymaker. If, in Loeb's mind, it was necessary to engage in particular

unsatisfied burden of showing any legal damages because of some rigid rule of causation. The question is not primarily one of showing damage, but one of the extent of damage where there are multiple causes, none susceptible to precise measurement, which are in source independent and yet interact upon each other in producing injury. We note in the Restatement of Torts (1939), relied upon broadly in *Monard*, and by the master as well, that in a case where the damages cannot be precisely calculated because of the interaction of concurrent causes, there is no burden of excluding all other causes of loss, and that estimates based upon such evidence as is "reasonably available" under the circumstances may be accepted. Section 912, illus. 12. See also comment d to that section. In fact, *Bigelow* suggests that the burden of excluding the effect of other causes may sometimes be upon the wrongdoer. See 327 U.S. at 264. Whether or when such a burden may be imposed is a difficult question which we find impractical to rule on without going deeply into evidentiary matters which have not been argued and which, conceivably, may not recur in the same form or context.

acts in order to warrant remaining in business, then, in the true sense, those acts caused his being in business. This must have been so regardless of whether, in point of fact, he was correct in his appraisal. If, for example, Loeb felt that it was essential to obtain illegal assistance from the union in order to continue in business, it follows that his decision to continue, and hence his continuing, resulted from his success in accomplishing this unlawful act. The question is not whether, viewed from hindsight, the union cooperation did him any essential, or, indeed, any material good.[17] The master made this analysis at the outset, and properly addressed himself to what was Loeb's state of mind when deciding whether to enter Haverhill initially, finding, on this issue, against Gazette. He then, however, abandoned this approach, and applied a strict benefit-received rule, viewed, moreover, not as he concluded Loeb viewed it at the time, but as it appeared to the master in the light of the damage testimony which he credited. The issue, he stated, was simply whether Loeb would have stayed had he in fact not received the specific advertising benefits which Gazette had succeeded in establishing to the master's satisfaction.

Passing the extent to which the master erred in finding these benefits too small, the ultimate question must be not what benefits the master found in 1963, but what Loeb thought in 1958 and 1959. Moreover, even if Loeb's ap-

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[17] Launching a newspaper, as Loeb himself testified, is a very difficult undertaking, particularly at Christmas. Loeb himself was surprised at his success. The fact that Gazette's printers were on strike, with Haverhill being a particularly strong union area, was certainly a significant factor. It was not a factor attributable to Loeb. However, under these circumstances Loeb's subsequent capitalization on Gazette's union difficulties to the extent of obtaining specific unlawful union assistance (we agree with the master in not holding ULCo responsible for the union's independent activity on a theory of conspiracy) must have been regarded by him as highly important, if not vital, to his continuance.

praisal of the affirmative dollar benefits received coincided exactly with the master's, it still may have been that he believed that his losses would have been greater but for his illegal activities, or persistently took an optimistic view that matters would improve, which, absent these activities, he would not have entertained. The master's substantial misinterpretation and limitation of this issue was clear error.

There must be a new trial. Because of several of the matters discussed herein we find it impossible to separate what findings were infected by error. We accordingly vacate the report in its entirety. Furthermore, we believe that the damage issues should be submitted to a new trier. Where a trier of fact has been corrected for a number of serious errors there are bound to be strains on a second trial, conscious or unconscious, irrelevant to the issues, and hence disruptive. One may think one was not really wrong, and hence resist, consciously or otherwise, the new rules, or, conversely, lean over backwards. Alternatively, if one fully accepts the new principles it may be natural to overemphasize them.[18] Because of this we have sometimes remanded a case for trial before another judge, not as a reflection on the first, but to avoid such complications. This is particularly important where a prior error related to the quantum or burden of proof. *Murray* v. *United States*, 1 Cir., 1962, 300 F.2d 804; *Commissioner* v. *Young Motor Co.*, 1 Cir., 1963, 316 F.2d 267.

Judgment will be entered setting aside the judgment of the District Court and ordering the report of the special master to be vacated. Further proceedings to be not inconsistent with this opinion.

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[18] It should be unnecessary to say, but we do out of caution, that nothing stated in this opinion, or omitted therefrom, is indicative of our views on the merits, or is to suggest any particular result.

APPENDIX B

Statutes Involved

Section 1 of the Sherman Act, 15 U.S.C. § 1 so far as pertinent:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .

Section 2 of the Sherman Act, 15 U.S.C. § 2 so far as pertinent:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . .

Section 4 of the Clayton Act, 15 U.S.C. § 15:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Section 7 of the Clayton Act, 15 U.S.C. § 18 so far as pertinent:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Com-

mission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning the holding all or a part of the stock subsidiary corporations, when the effect of such formation is not to substantially lessen competition . . .

Section 16 of the Clayton Act, 15 U.S.C. § 26, so far as pertinent:

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in

any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18 and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that a danger of irreparable loss or damage is immediate, a preliminary injunction may issue . . .

Appendix C

ORDER
July 13, 1961

WAZANSKI, J.

1. In this litigation the following procedural steps, among others, have taken place: (1) September 17, 1959 pursuant to Rule 42b of the Federal Rules of Civil Procedure, this Court ordered a separate trial on all issues other than the issues of damages raised by the pleadings; (2) on these other issues this Court held a trial and entered Findings of Fact, Conclusions of Law, and, on December 30, 1959 a partial final Decree (see 180 F. Supp. 125); (3) with some modifications, this judgment was affirmed by the Court of Appeals on December 2, 1960 (see 284 F. 2d 582). A petition for writ of mandamus having been sought to prohibit further hearings in this case, the Court of Appeals first granted a stay of the proceedings in this Court, next denied the requested relief, and today refused further to stay the proceedings in this Court, but on the contrary said that the Court of Appeals "do not wish to prolong" the interruption of proceedings in the District Court.

2. The only issues now being left for adjudication relate to damages. These are precisely analogous to issues of damages which would be raised in patent, copyright, and like cases following an appellate adjudication on issues of liability. Such cases are customarily referred to a Master for the ascertainment of damages.

3. In the light of the usual practice in parallel cases, and following the provisions of Rule 53 of the Rules of Civil Procedure, I have concluded that it is in the public interest and the interest of the parties that this case should now be sent to a Master. Among the reasons which have led me to make this reference are that the issues are complicated; they relate in part to details of accounting; and they

present questions which perhaps can be better dealt with not on successive, but on staggered days of hearing.

4. For the foregoing reasons, I refer this case to Derek Curtis Bok, Esq., whose office address is The Harvard Law School, Cambridge 38, Massachusetts, on all issues of damages. I direct him to find the facts, state his conclusions of law, and make any recommendations deemed by him appropriate for judicial action.

5. In performing his functions, he shall use the services of a court reporter to take a transcript of all the evidence and arguments before him, and shall preserve for the Court that transcript, together with all other evidence and exhibits.

6. He may begin the hearings at any time convenient to himself, but not later than October 2, 1961, and he shall file his report with the Court not later than August 31, 1962.

7. He may hold hearings in a courthouse or in any other suitable place to which the public may be given access, such as a public room at the Harvard Law School.

8. The Master shall exercise the power to regulate all proceedings in any hearing before him, to schedule them at times convenient to himself and the parties, and to do all acts and to take all measures necessary or proper for the efficient performance of his duties under the Order.

9. He may require the production before him of evidence upon all matters embraced in the reference, including all books, papers, vouchers, documents, and writings applicable thereto. He may rule upon the admissibility of evidence. He has the authority to put witnesses on oath. He may himself examine and may call the parties to the action and examine them upon oath.

10. For his services, the Master shall be paid $15.00 per hour for each hour spent either in hearing testimony and argument, or in preparation of his report. In addition, he shall be entitled to all his disbursements, including any

necessary secretarial assistance. He shall keep a record of the time and money he spends in connection with this case.

11. Unless the parties otherwise stipulate, the report of the master shall not be final, but the parties shall have the rights reserved to them by Rule 53.

CHARLES E. WYZANSKI, JR.
United States District Judge

Office-Supreme Court, U.S.
FILED
NOV 9 1964
JOHN F. DAVIS, CLERK

Supreme Court of the United States.

OCTOBER TERM, 1964.

No. 502.

UNION LEADER CORPORATION,
Petitioner,
v.
THE HAVERHILL GAZETTE COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR THE HAVERHILL GAZETTE COMPANY, RESPONDENT, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Supreme Court of the United States.

OCTOBER TERM, 1964.

No. 502.

UNION LEADER CORPORATION,
Petitioner,

v.

THE HAVERHILL GAZETTE COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR THE HAVERHILL GAZETTE COMPANY, RESPONDENT, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Introductory Note.

Because of the allegations of "Bias" (see, *e.g.*, Petition, p. 24, "IV" (heading)) made by petitioner against the First Circuit Court of Appeals (allegations without any basis and not made till *after* the June 8, 1964, decision adverse to petitioner) and because of the other unusually strong allegations as to the opinion of the said Court of Appeals, which allegations are summarized *infra* at pages 41 and 42, the respondent has believed it necessary to analyze the evidence in this record of almost 3,500 printed pages (there were an additional approximately 1,400 pages

in the 1959-1960 record) overwhelmingly supporting the judgment of the Court of Appeals which set aside the judgment of the District Court and vacated the Master's Report herein as "infected with error" and ordered a new trial. This analysis appears at pages 45 to 57, *infra*, and in the Appendix to the Brief. The "Summary of Argument" herein appears at pages 13 ff., *infra*.

Opinions Below.

The opinion of the United States Court of Appeals for the First Circuit, of June 8, 1964, as to which review by a writ of certiorari is sought by Union Leader Corporation herein, appears in 333 F. 2d 798-808.

The denial by the Court of Appeals, on July 6, 1964, of Union Leader Corporation's "Motion to Recall Mandate," etc., appears at 333 F. 2d 808-810.

The opinion of June 8, 1964, also appears in the certified Record herein, at VIII D.R.* 15-30, 31 (Judgment), and at pages 26-41 of the Petition herein.

The Report of the Special Master, Professor Derek Curtis Bok, appears at I D.R. 176-239. The Report, adopted by the District Court with one exception (see p. 9, *infra*) (reported at 218 F. Supp. 487 (1963)) (see, for opinion on counsel fees, 218 F. Supp. 490), was vacated *in toto* by the Court of Appeals, which ordered the District Court, because the Master's Report and findings were so greatly "infected by error" (333 F. 2d at 808; Petition, p. 41), to submit "the damage issue . . . to a new trier," and not to Professor Bok (*ibid.*).

Prior opinions in this case are further set forth in the first paragraph of respondent's "Counterstatement of the Case," p. 4, *infra*.

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*See first footnote, p. 4, *infra*.

Jurisdiction.

This Court's jurisdiction as to petitioner's points "I," "II" and "III" is based on 28 U.S.C. § 1254 (1). As to petitioner's point "IV," as explained *infra* (pp. 59-61), petitioner seeks review of a 1960 final judgment as to which final judgment *certiorari* was denied in 1961 by this Court, and respondent therefore moves to dismiss this point for the reasons there stated (*infra*, pp. 59-61).

Statutes Involved.

These are set forth on pages 42-44 of the Petition.

Questions Presented.

I. Should this Court review, in any event, in an interlocutory stage, the 1964 judgment of the Court of Appeals remanding the case to a new Master for a new trial on the amount of damages in this anti-trust case?

II. Whether the Court of Appeals erred in holding that, under principles of collateral estoppel, a final judgment, in 1960, dismissing Union Leader Corporation's complaint against The Haverhill Gazette Company (No. 658, October Term, 1960), was binding on U. L. Co. herein.

III. Whether the Court of Appeals erred in propounding the principles set forth in its 1964 opinion on causation and burden of proof.

IV. Whether this Court should or may review a final judgment, adverse to Union Leader Corporation, as to which certiorari was denied in 1961, on the points attempted to be raised by petitioner in its point "IV."

Counterstatement of the Case.

The facts of this case, involving the counterclaim of the respondent, The Haverhill Gazette Company, publisher of the Haverhill Gazette (hereinafter sometimes called H. G. Co.), for damages for numerous violations by the petitioner, Union Leader Corporation, publisher of the Haverhill Journal (hereinafter sometimes called U. L. Co.) of 15 U.S.C. §§ 1 and 2, insofar as the liability and causation aspects are involved, may be found in the previous opinion of the Court of Appeals, *Union Leader Corp.* v. *Newspapers of New England, Inc.*, and *Haverhill Gazette Co.* v. *Union Leader Corp.*, 284 F. 2d 582; cert. den. 365 U.S. 833 (No. 658, October Term, 1960). See also *In re Union Leader Corp.*, 292 F. 2d 381; cert. den. 368 U.S. 927 (No. 435, October Term, 1961). (See Stipulation in Court of Appeals, I D.R.* 606 ff.)†

The facts subsequent to the decision of the Court of Appeals in December, 1960 (284 F. 2d 582), may be summarized as follows:

After the denial of certiorari in March of 1961 by this Court as stated, the petitioner herein attempted by an alleged affidavit of prejudice to have the District Court Judge (Charles E. Wyzanski, Jr.) disqualified. The affidavit was stricken (I D.R. 2). Union Leader Corporation sought mandamus in the Court of Appeals, and its petition was denied, 292 F. 2d 381, July 13, 1961.

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*D.R.=Printed Record, of almost 3,500 pages, in second part of the case (1961-1963) on amount of damages, filed by petitioner with its Petition. The Printed Record, of about 1,400 printed pages, in the first part of the case in 1959-1960, Nos. 5619-5620 in the Court of Appeals and No. 658, October Term, 1960, on file in this Court, is hereinafter referred to as "R."

† The December, 1959 (amended January, 1960), District Court's Findings, Conclusions and Opinion are found in R. 1066 ff.

In the mandamus proceeding H. G. Co. was permitted to intervene "In accordance with our [the Court of Appeals'] customary practice," and with the assent of Judge Wyzanski. The Court of Appeals stated in its opinion:

> "But where a case, and particularly an antitrust case, has already been tried at length on the merits, the issue of damages, although separate in a sense, is necessarily tied into matters already heard. Resumption before the same judge would undoubtedly be a simpler, shorter and less costly procedure than it would be to recommence with a new one. 'Intervenor accordingly has an immediate and legitimate interest to protect." 292 F. 2d 381, 384, n. 4.

On July 13, 1961, the Court of Appeals refused a further stay of proceedings to Union Leader Corporation, on the ground that the Court of Appeals "do not wish to prolong" the interruption of proceedings in the District Court. On July 13, 1961, the same day, Judge Wyzanski issued an order (I D.R. 100; Petition, pp. 45-47), sending "The only issues now being left for adjudication," which "relate to damages," to a Special Master, Prof. Derek Curtis Bok:

> ". . . I refer this case to Derek Curtis Bok, Esq., whose office address is The Harvard Law School, Cambridge 38, Massachusetts, on all issues of damages. I direct him to find the facts, state his conclusions of law, and make any recommendations deemed by him appropriate for judicial action." (I D.R. 101; Petition, p. 46.)

As reasons for the reference Judge Wyzanski stated:

> "In the light of the usual practice in parallel cases, and following the provisions of Rule 53 of the Rules of

Civil Procedure, I have concluded that it is in the public interest and the interest of the parties that this case should now be sent to a Master. Among the reasons which have led me to make this reference are that the issues are complicated; they relate in part to details of accounting; and they present questions which perhaps can be better dealt with not on successive, but on staggered, days of hearing." (I D.R. 101; Petition, p. 45.)

The first conference with the Special Master (hereinafter sometimes called Master) took place in August, 1961; the first reported hearing in November, 1961 (I D.R. 240; II D.R. 626); the opening argument in January, 1962 (I D.R. 240); and thereafter, and until June 6, 1962, the opening day of testimony (I D.R. 241), there were a number of stipulations signed by the parties, particularly with reference to accounting procedures (see I D.R. 240-241).

In September, 1961, after the appearance before the Master, U. L. Co. had filed a petition for certiorari from the denial of the aforementioned writ of mandamus.

By letter of September 29, 1961, after the said petition had been filed, petitioner wrote to Mr. Justice Frankfurter (copy to H. G. Co.'s counsel, the Chief Justice, Judge Wyzanski, and the Solicitor General) a letter requesting him to "take no part in considering or determining the allowance of this present petition," on the ground that Justice Frankfurter is "personally acquainted with both the publisher who asserts the existence of personal prejudice on the part of the Judge, and with the Judge who denies his prejudice," and adding:

"It is our information and belief that Judge Wyzanski has enjoyed a close personal and professional relationship

with you [*i.e., Justice Frankfurter*] which covers a long span of years and this is widely recognized in the First Circuit."

This Court denied the said petition for certiorari, without comment, in December, 1961 (368 U.S. 927) (No. 435, October Term, 1961).

The damage trial proper began,* as already stated, on June 6, 1962, and the last day of testimony was November 1, 1962. In August, 1962, U. L. Co.'s motion to dismiss was filed and denied (I D.R. 165-171; I D.R. 7). The final arguments were held on December 3, 1962 (I D.R. 242). H. G. Co.'s damage claims, as amended, appear in I D.R. 133-165, and VII D.R. X-1 to X-95.

The "Eight Merchants" testified during the damage trial (see I D.R. 414-416; also see especially I D.R. 364-405)—they who were found in the 1959 trial to have been offered by Loeb (President and dominant figure in U. L. Co.) a contract "truly extraordinary" (333 F. 2d 805; Petition, pp. 35-36), giving them *payments of $1,000,000* over a period of years and *25% of the profits* of the Journal *if and when the Journal became under Loeb's control the only paper in Haverhill*, and *$20,000* a year in *secret cash payments* for the meantime. The Eight advertised exclusively in the Journal till May, 1960, even after the injunction of December, 1959 (see Ex. 22, VII D.R. X-79 to X-82).†

Ellis, of J. M. Fields, the largest advertiser in Haverhill, also testified. Ellis admitted that J. M. Fields switched at once, from advertising over 2 to 1 in the Gazette, to 100% in the Journal immediately after he offered a contract, held

*The "Damage Period" was December, 1957, to September 15, 1959.

†These figures as to the Eights' advertising, together with the other financial and accounting data referred to hereinafter in this brief (with certain exceptions), were stipulated to as *binding* (see Stip. Ex. 6-A, VII D.R. 314-336, IV D.R. 2142).

illegally discriminatory in 1959 by the District Court, to the Journal, and after that offer was accepted by the Journal, although the Gazette had turned it down (R. 1073, 1093). A number of a group of twenty-five advertisers who put most or all of their advertising in the Journal also testified, mostly being called by U. L. Co.* They had been contacted by the joint visits of the Labor Union "boys" and the Journal solicitors and (as to most) by the "Big Eight" Merchants (see I D.R. 414-416; I D.R. 364-405; II D.R. 1023). The testimony of many of them is summarized at I D.R. 364-405. There was testimony and evidence about a large and continuing number of illegal advertising discriminations granted by U. L. Co. to a large number of advertisers, since February, 1958 (see I D.R. 364-405, *passim;* see Exhibits S-22, S-22(b), S-23(b); R. 1313-1316, R. 966-967, R. 143† and VII D.R. X-271-272, IV D.R. 2102). Representatives of the Labor Union, with whom Loeb worked in joint and close co-operation against H. G. Co., testified (see I D.R. 408-412, and I D.R. 272, at 275, 276, 278, 279).

H. G. Co. presented ample evidence of the "Post-damage" period, *i.e.*, September, 1959, to December, 1961, which showed the striking rise in the Gazette's fortunes and the decline of the Journal's after the 1959 injunction (see I D.R. 350-351). H. G. Co. presented evidence, oral and documentary, showing that its fair market value between December, 1957, and September, 1959, had declined at least $610,000 (IV D.R. 1919, 1935). (See I D.R. 350.)

The Master's Report was issued on March 1, 1963 (I D.R. 176-240), awarding $88,325.97 trebled damages to the

*As the Court of Appeals put it (333 F. 2d 805; Petition, p. 35a): "The fact, for example, that various advertisers could not, *or would not* in 1962, recall that they were importuned by union members to use the Journal and not the Gazette . . ." (Emphasis supplied.) See discussion *infra*, pp. 45-51. (See also Appendix, pp. 71-72, 78-81.)

†See R. 1093, 1077, and the opinion of the Court of Appeals at I D.R. 615 (last paragraph) to 616.

Gazette ($29,441.99 single damages), only as to part of H. G. Co.'s damage claims with respect to the "Eight Merchants," but denying all H. G. Co.'s other claims, for the reasons discussed *infra* in this brief, and both sides filed objections to the Master's Report (I D.R. 245; I D.R. 416). The hearing (I D.R. 418) on the Haverhill Gazette Company's and Union Leader Corporation's motions thereon was held in May, 1963, and Judge Wyzanski's opinion and judgment (I D.R. 598-604), adopting the Report with one change as to the name of the counterclaimant (being The Haverhill Gazette Company, and not Newspapers of New England, Inc., *as erroneously stated by the Master throughout*), was filed and entered on June 10, 1963.* A motion, with accompanying affidavits, of the Haverhill Gazette Company for assessment of counsel fees and expenses (I D.R. 481-482) having been filed, Judge Wyzanski wrote a separate opinion thereon, also on June 10, 1963† (I D.R. 592-598; see 604), in which he awarded $60,000 in counsel fees and $8,000 expenses, and stated in part:

> "In preparing and proving their client's claim for damages, The Gazette had counsel who demonstrated the highest professional ability. They showed a mastery of subtle issues of law. They discovered, appraised, marshalled, and presented complicated facts. They resolutely met skillful, resourceful, and determined opposition. . . .
>
> "In the instant case, it is clear that the highest professional skill was required successfully to prepare, present, and otherwise prosecute The Gazette's claim for damages . . ." (I D.R. 592, 597.) (218 F. Supp. 490, 491, 493.)

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*Now reported in 218 F. Supp. 487 (Sept. 9, 1963).

†Now reported in 218 F. Supp. 490 (Sept. 9, 1963).

The amount of counsel fees and expenses was included in the judgment of June 10, 1963 (I D.R. 603-604), which thus totaled $156,325.97, plus costs. The Haverhill Gazette Company filed its notice of appeal on June 26, 1963 (I D.R. 604), and docketed its appeal on July 29, 1963. A stipulation as to the Record herein was filed and approved by the Court of Appeals on July 29, 1963 (I D.R. 606).

The decision and judgment of the Court of Appeals (see p. 2, *supra*) were entered on June 8, 1964 (VIII D.R. 15-30, 31). Union Leader Corporation's petition for rehearing (VIII D.R. 33) was denied (VIII D.R. 37), and the mandate issued (*ibid.*).

Subsequently, Union Leader Corporation filed a "Motion to Recall Mandate," etc. (IX* D.R. 1-4), denied by the Court of Appeals on July 6, 1964 (IX D.R. 5-7) (333 F. 2d 808-810).

The said motion to recall mandate, etc., had alleged in part:

> "The affidavit of prejudice filed as to the District Court, coupled with the statutory inability to make such application as to this (*i.e.*, the Court of Appeals) Court, and the actions of this Court involving the application of both substantive and procedural law, have created an atmosphere of hostility under which Union Leader Corporation is convinced of its inability to obtain in the First Circuit that fair treatment under both substantive and procedural law which every litigant, regardless of prior conduct, political philosophy or advocacy of principles, is entitled. *Hence, in the event certiorari is denied, Union Leader Corpora-*

*Volume IX, not labelled by the Clerk of the Court of Appeals as such, we shall call herein the additional papers, of eight pages, certified on July 16, 1964, by the Clerk of the Court of Appeals, and following after the volume labelled "VIII," p. 40.

tion will move for a change of venue to another District and Circuit." (Emphasis supplied.)

(Almost needless to say, no issues of the "political philosophy or advocacy of principles" of Mr. William Loeb or Union Leader Corporation are presented in this antitrust damage case; nor did U. L. Co. complain of the alleged bias of the entire Court of Appeals until *after* the June 8, 1964, decision adverse to U. L. Co. (see Petition, p. 24 (heading of Point "IV" of U. L. Co. Petition), and pp. 59-61, *infra* (see p. 10, *supra*).

On June 30, 1964, after the return of the mandate to the District Court, Judge Wyzanski appointed a new Master, who subsequently resigned (because he discovered that a possible conflict of interest existed due to the representation of clients of a partner of his in his Boston firm of Ropes & Gray).

U. L. Co. then applied to Mr. Justice Goldberg for a stay of mandate. H. G. Co. opposed the stay. The stay was granted on August 11, 1964.

On September 15, 1964, Judge Wyzanski entered an order which appointed a new Master. U. L. Co. at once filed (September 16, the day the order was received by U. L. Co.) a motion with the District Court to vacate that order. Judge Wyzanski, in a hearing on September 17, emphasized that "no discourtesy" whatsoever was intended to Mr. Justice Goldberg or to the order of this Court, and that he, Judge Wyzanski (who had been on vacation abroad), was unaware of Mr. Justice Goldberg's order of August 10, and "had no knowledge about it." He suspended the order.

U. L. Co. then filed an application for enforcement of the order of August 10, 1964, with Mr. Justice Goldberg, who denied it on September 28, 1964, pointing out that "the suspension of the order . . . was intended by the District Court to have the same effect as vacation of said order."

The order of September 15 was therefore "deemed" vacated as of that date and "Application for Enforcement of the Stay order of this Court of August 10, 1964 is consequently denied."

The decision and judgment of the Court of Appeals of June 8, 1964 (VIII D.R. 15-30; 333 F. 2d 798-808; Petition, pp. 26-41), as to which certiorari is sought, is discussed in detail below (pp. 24-59).

In introducing its discussion of the details of the Master's Report and the District Judge's approval of the same, the Court of Appeals "start[ed]" with—

> "the basic fact . . . that Gazette [H. G. Co.] entered the damage hearing with comprehensive findings in its favor indicating serious and continuous illegal activity of many sorts by U. L. Co. over a period of years, and 'Stupendous losses' whether or not as a result of U. L. Co.'s wrongdoing and wound up with a finding of damages in an amount of comparative insignificance[3]" (333 F. 2d at 801; Petition, p. 28).

"[3] U. L. Co.'s brief describes it as 'relatively microscopic'." (Footnote in original.)

As a result of H. G. Co.'s successful appeal and U. L. Co.'s unsuccessful appeal (the latter disposed of in footnote 2 of the opinion, VIII D.R. pp. 16-17; 333 F. 2d at 801; Petition, pp. 27-28), and of the prior rulings of the Court of Appeals and the denials of certiorari by this Court, U. L. Co., after almost six years of litigation, is in a position where it had begun a groundless antitrust suit against others, and then was itself found guilty of flagrant and numerous antitrust violations in a "life-and-death struggle" in a city and area which could only support one high-grade daily newspaper (I D.R. 612). As the Court of Appeals put it in June of 1964 (IX D.R. p. 3; 333 F. 2d 809):

"The finding of substantial violations of the Sherman Act by Union Leader still stands, and is, in our opinion, presently final."

And in 1960:

"Union Leader [was] a party who pursue[d] an unlawful course of conduct from the moment it appears on the scene" (I D.R. 622; 284 F. 2d 582, 589).

Summary of Argument.

(I) Except in unusual cases and for exceptional reasons, it is settled that this Court will not review non-final judgments. The judgment of the Court of Appeals of June 8, 1964, set aside the judgment of the District Court, vacated the Master's Report, and ordered a new trial on the issue of the amount of damages. Such a reversal ordering a new trial offers no such exceptional reason, nor, indeed, does petitioner (which fails to discuss this point) indicate any such.

(II) Point I should therefore be dispositive of the Petition. Nevertheless, we also consider the points actually raised by petitioner:

(A) There can be no doubt that the Master and the District Judge were in error in ignoring the collateral estoppel, which was absolutely binding on U. L. Co. as a result of the 1960 judgment dismissing U. L. Co.'s original action (see 284 F. 2d 582), and holding that H. G. Co. had not engaged in any illegal advertising discriminations, which judgment—final in this respect as per F.R.C.P. Rule 54 and 28 U.S.C. § 1291—was based upon specific findings of the District Court, *essential to the judgment*, to the effect that H. G. Co. was only acting self-defensively with

a proper intent, *after* the wrongful acts of U. L. Co. had inflicted heavy substantial damage upon H. G. Co., and in fact had put H. G. Co. in peril of insolvency in the equity sense. The Master completely ignored this collateral estoppel. He further ignored the rule of law that a separate trial finding of liability in an antitrust case—and there was a previous separate trial in the District Court here both as to liability and as to injunctive relief (R. 87)—necessarily imports impact and causation, *i.e.*, the fact of damage, as distinct from the actual dollar amount of damage (see cases cited at 333 F. 2d 802; Petition, p. 30). This, indeed, was conceded by petitioner as far back as its 1960 brief in the Court of Appeals, and in the course of the 1959 trial; petitioner therefore was not "lulled" into not contesting the point.

The Master showed no awareness whatsoever that the trial by the District Court of the issue of and its finding of U. L. Co.'s liability to H. G. Co. necessarily imported any such finding of substantial damage caused to H. G. Co. as to each of the many various illegal acts U. L. Co. was found to have committed.

Further, the Court of Appeals limited the conclusive and finally binding collateral estoppel only to U. L. Co.'s illegal advertising discriminations—not to *all* its illegal activities. It would appear that this limitation was actually more *favorable* to U. L. Co. than it should have been, when the original 1959 finding referred to above is analyzed. But at any rate—

(B) There was at least a burden on the Master, to be met by him, before he could find that the Court was wrong as to *any* issue embraced in or underlying the earlier decree—even though interlocutory as re-

gards U. L. Co.'s liability for all its *other* numerous illegal activities than U. L. Co.'s illegal advertising discriminations—as U. L. Co. "pursue[d] an unlawful course of conduct from the moment it appears on the scene" in the words of the Court of Appeals.

That burden upon the Master to give due "consideration" to the prior (1959-1960) findings and rulings of the District Court and Court of Appeals neither the Master, nor the District Court subsequently, recognized, as the Court of Appeals pointed out. Nor did the Master recognize that, as above stated, a finding of liability in an antitrust case necessarily imports impact and causation, *i.e.*, "the fact" of damage as distinct from the dollar amount of damage.

The Master, instead, not only failing to recognize that there was any burden on him as above stated, imposed, to the contrary, a highly improper and unlawful standard of the burden of proof, and of causation upon H. G. Co. and one contrary to the rule of the *Bigelow* case (327 U.S. 251) (see *infra*, p. 37). The standard imposed was in actual effect that of proof beyond a reasonable doubt, and, indeed, frequently beyond *any* doubt; and the rule of causation he adopted was that of the "sole cause" or the "predominant cause" or "a more substantial cause of harm than any other known cause"—not the correct rule of *a substantial* cause and the burden of proof in civil cases. It would, correctly stated the Court of Appeals, indeed, in the instant antitrust case, be very harsh and unjust to impose, as the Master did, such rigid standards and burden of proof—this being a case where, in the words of the Court of Appeals, "U. L. Co engaged in massive illegal assaults upon Gazette's advertisers . . . which were considered, in U. L. Co.'s opinion, at least, of such

extraordinary value" and which "certainly . . . were expressly designed to accomplish exactly the losses which Gazette in fact suffered."

Yet U. L. Co. time and again argues that the entire Court of Appeals acted "manifestly unfair[ly]" and with "Alleged Bias" against U. L. Co. and Loeb, its President (of which there is no evidence and of which U. L. Co. did not complain till the decision of the Court of Appeals of June 8, 1964, adverse to U. L. Co.), and allegedly acted against all "fairness, law, logic and respect for a firm administration of justice"; and that there was not even "a scintilla" of evidence to support the reversal by the Court of Appeals of the Master's Report. It therefore becomes necessary to examine in this Brief the evidence, in the face of such allegations, in some detail.* Such examination reveals clearly the unfounded nature of U. L. Co.'s allegations and accusations.

Actually, although the Court of Appeals pointed out the failure of the Master to recognize that there was a burden upon him, due to the prior findings and rulings of the District Court and Court of Appeals, and that the "clearly erroneous" rule did not uniquely apply here, yet in fact the Master's findings were, in addition, clearly erroneous. At any rate, above all, he completely ignored the illegal contract of $1,000,000 and 25 per cent of the Journal profits and $20,000 a year paid to the Eight Merchants to go out illegally and get the other Haverhill merchants to advertise in U. L. Co.'s Journal. As the Court of Appeals put it: "This truly extraordinary contract and what might seem to be inevitable consequences, (he) dismissed in silence." 333 F.

*See also Appendix hereto for such evidence.

2d at 805; Petition, pp. 35-36. Actually, the evidence before the Master, correctly analyzed, was not substantially different from that before the District Judge, so far as impact and causation are concerned. H. G. Co.'s failure to call many of the advertisers who were illegally tampered with by U. L. Co. is not significant. The advertisers *were* called by U. L. Co. and testified, and therefore no "inference" is to be drawn against H. G. Co.

(C) The Record amply supports the result reached by the Court of Appeals.

(1) As to the Eight Merchants, their massive and concerted assaults on most Haverhill advertisers are clear, as found in the 1959 trial and admitted in the 1962 trial. Indeed, they were helped in these efforts by U. L. Co. illegally combining with a Labor Union to "cover" every advertiser in Haverhill and get them to advertise in the Journal. This, too, was found in the 1959 trial and again admitted in the 1962 trial.

The Master consistently ignored admissions by Loeb and the Eight Merchants as to the 25 advertisers, including Loeb's admissions that the Eight got him as much advertising business as they possibly could.

(2) As to J. M. Fields, the largest advertiser in Haverhill, "the most serious discrimination" (R. 1205, 1077, 1093) of all the illegal U. L. Co. discriminations, the collateral estoppel should have applied here and, irrespective of this, the Master's findings of no damages at all in this respect simply cannot be understood in view of the testimony of J. M. Fields's advertising Manager.

(3) *Irrespective of all other points*, the result reached by the Court of Appeals was certainly correct because of the Master's clear errors of law and

fact in considering the major issue of H. G. Co.'s "largest" or "maximum claim," which raised in turn the question of the intent of Loeb and U. L. Co. in entering and remaining in Haverhill, a city which could only support one high-grade local daily newspaper. The Master conceded that this issue was vital, since, if Loeb, who was suffering stupendous losses, would have left Haverhill *but for* the *benefit* of his flood of illegal activities, H. G. Co.'s maximum claim should be considered. But the Master, in denying this claim, used a strict and clearly erroneous "benefits received" test in considering Loeb's intent, rather than the proper test of *Loeb's belief* in 1957-1959, the damage period, as to what benefits he might well have expected for his entire illegal course of conduct. (See also the Appendix to the Brief.)

(III) The Court of Appeals therefore correctly reversed and sent the case back for a new trial and ordered the District Court to appoint a new Master in the place of one whose report was thus so "infected with error."

(IV) U. L. Co.'s allegations of "bias" against the Court of Appeals (unsupported by any evidence) came *after* the adverse decision against it and are not worthy of further discussion. U. L. Co. may not now reopen the final judgment in 1960 and try to bring back into the case the original 21 defendants (284 F. 2d 582; cert. den. 365 U.S. 833) (F.R.C.P. Rule 54 and 28 U.S.C. § 1291).

U. L. Co. alleges that this case involves principles of "freedom" of newspaper competition—it involves rather the adjudicated extensive wrongdoing of U. L. Co., which is legally binding on U. L. Co. The case, indeed, on these special facts, has no broad or other application to other cases. The case at this interlocutory stage of a new trial

having been ordered concerns only the amount of damages to be awarded on such a new trial to H. G. Co., the substantially injured party.

The Petition should therefore be denied.

Argument.

I.

This Court does Not Ordinarily Review on Certiorari Non-Final Judgments.

(Point Not Discussed by Petitioner.)

Although "non-final judgments of federal courts of appeals are reviewable on certiorari," yet "the petitions in such cases are usually granted only for exceptional reasons." Stern & Gressman, Supreme Court Practice (3d ed., 1962), p. 419. See also page 148:

> "The Supreme Court will not usually grant certiorari to review a non-final judgment, such as one remanding the case to the district court for a new trial . . . in the absence of some exceptional reason."

In the instant case the Court of Appeals has ordered the case sent back for a new trial on damages because the Master's Report, as approved by the District Court, was, as a whole, "infected with error" (see p. 2, *supra*; pp. 57-59, *infra*). Both sides may, conceivably, be satisfied with the amount then to be awarded.* Even on many of the issues discussed by the Court of Appeals, that Court has cor-

*As, for example, U. L. Co. did not brief or argue on the 1963-1964 appeal any question as to the invalidity of the findings as to the $88,325 awarded H. G. Co. as to the Eight Merchants, and argued only the points set forth in footnote 2, 333 F. 2d 801; Petition, pp. 27-28.

rectly pointed out (footnote 16, Petition, p. 39; 333 F. 2d at 807):

> "Whether or when such a burden [*i.e.*, one indicated by the *Bigelow* case (1946), 327 U.S. 251—see *infra*, pp. 37-38] may be imposed is a difficult question which we find impractical to rule on without going deeply into evidentiary matters which have not been argued *and which, conceivably, may not recur in the same form or context.*" (Emphasis supplied.)

Thus this Court stated, in the case of *American Construction Co.* v. *Jacksonville, Tampa & Key West Railway Co.*, 148 U.S. 372 (1892), that, though under the Act of March 3, 1891, c. 517, § 6, this Court has power, in a case made final in the Circuit Court of Appeals, although no question of law has been certified by that Court to this, to issue a writ of certiorari to review a decree of that Court on appeal from an interlocutory order of the Circuit Court, yet the Supreme Court will not exercise this power "unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause."

As this Court stated at page 384:

> "Whether an interlocutory order may be separately reviewed by the appellate court in the progress of the suit, or only after and together with the final decree, is matter of procedure rather than of substantial right; and many orders made in the progress of a suit become quite *unimportant* by reason of the final result, or of intervening matters. Clearly, therefore, this court should not issue a writ of *certiorari* to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order, unless it is necessary to prevent

extraordinary inconvenience and embarrassment in the conduct of the cause." (Emphasis supplied.)

It is true that on rare and exceptional occasions certiorari has been granted to review a non-final judgment. See *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1951).

There the first issue was: Should final determination of the constitutional validity of the President's order seizing the Steel Mills be made in that case which had proceeded no further than the preliminary-injunction stage? The government claimed that the District Court injunction should not have been granted, since, if "the seizure ultimately be held unlawful, the companies could recover full compensation in the Court of Claims for the unlawful taking." (P. 585.) But this Court said:

> "Prior cases in this Court have cast doubt on the right to recover in the Court of Claims on account of properties unlawfully taken by government officials for public use as these properties were alleged to have been. [Citations.] Moreover, seizure and governmental operation of these going businesses were bound to result in many present and future damages of such nature as to be difficult, if not incapable, of measurement. Viewing the case this way, and in the light of the facts presented, the District Court saw no reason for delaying decision of the constitutional validity of the orders. We agree with the District Court and can see no reason why that question was not ripe for determination on the record presented. We shall therefore consider and determine that question now." (P. 585.)

See also *Cobbledick* v. *United States*, 309 U.S. 323 (1939). There an order of the District Court denying a motion to

quash a subpoena *duces tecum* requiring one to appear with papers and testify before a Grand Jury was held not a "final decision" within the meaning of the Judicial Code, § 128 (a). At pages 324 and 325 this Court stated:

> "Finality as a condition of review is an historic characteristic of federal appellate procedure. It was written into the first Judiciary Act[2] and has been departed from only when observance of it would practically defeat the right to any review at all.[3] Since the right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice, Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration. Thereby is avoided the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment. To be effective, judicial administration must not be leaden-footed. Its momentum would be arrested by permitting separate reviews of the component elements in a unified cause. These considerations of policy are especially compelling in the administration of criminal justice."

"[2] §§ 21, 22, 25 of the Act of September 24, 1789, 1 Stat. 73, 83-85. For a discussion of the historical background, English and American, of the finality concept, see Crick, The Final Judgment as a Basis for Appeal, 41 Yale L. J. 539." (Footnote in original.)

"[3] See § 129 of the Judicial Code, 28 U. S. C. § 227, dealing with appeals from interlocutory injunctions, appeals from interlocutory decisions in receivership cases and from interlocutory decrees determining rights and liabilities in admiralty litigation." (Footnote in original.)

In *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U.S. 251 (1915), this Court said, at page 258:

"As has been many times declared, this is a jurisdiction to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision. [Citations.] And, except in extraordinary cases, the writ is not issued until final decree. [Citations.] The decree that was sought to be reviewed by certiorari at complainant's instance was not a final one, a fact that of itself alone furnished sufficient ground for the denial of the application . . ."

In *United States* v. *General Motors Corp.*, 323 U.S. 373 (1944), the question presented, unlike the instant case, was one on which the decisions of Federal Courts are in conflict. See also *Hanover Star Milling Co.* v. *Metcalf*, 240 U.S. 403, 408-409; *Forsyth* v. *Hammond*, 166 U.S. 506.

In *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1948), this Court stated in footnote 3 on page 685:

"The judgment of the Court of Appeals was not a final one, but we considered it appropriate for review here since, in our view, the jurisdictional issue was 'fundamental to the further conduct of the case.' See *Land* v. *Dollar*, 330 U. S. 731, 734 (1947)."

In *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, this Court said at page 52:

"*Fourth.* The Circuit Court of Appeals should have reversed the decrees for a preliminary injunction. It is true that ordinarily the decree of a District Court granting or denying a preliminary injunction will not be disturbed on appeal. But that rule of practice has no application where, as here, there was an insuperable objection to the maintenance of the suit in point of

jurisdiction and where it clearly appears that the decree was the result of an improvident exercise of judicial discretion." (Citations.)

This instant case, again, clearly presents no such exceptional circumstances, nor, indeed, does U. L. Co. allege any such.* A new trial on damages has been ordered. It should proceed.

II.

THE COURT OF APPEALS, IN OVERTURNING THE MASTER'S REPORT, APPLIED CORRECT RULES OF LAW AS TO THE MEASURE AND PROOF OF DAMAGES (PETITIONER'S POINTS I, II, III).

While point I of this Brief, we respectfully submit, should be sufficient to dispose of the Petition, we also consider petitioner's other points.

A.

Illegal Advertising Discriminations of U. L. Co. (Petitioner's Point II).

The Court of Appeals correctly held there was a "final judgment" as to which "collateral estoppel" must apply on the issue of whether U. L. Co.'s substantial advertising discriminations "inflicted some substantial damage upon the Gazette" (333 F. 2d at 803; Petition, p. 33; VIII D.R. 22).

As the Court of Appeals put it in its 1964 decision:

> "However, as to one issue there has been a final judgment, and with respect thereto collateral estoppel must apply. Our decision on the first appeal ordering

*See pp. 60-61, *infra*.

U. L. Co.'s complaint dismissed was upon the ground that the district court's finding of substantial advertising discriminations, dealt with on proper principles, amounted, on the court's subsidiary findings, to legal justification for defensive retaliation in kind by Gazette. This dismissal constituted, inescapably, a final judgment, *cf. Smith* v. *Vulcan Iron Works*, 1897, 165 U.S. 518, and U. L. Co stands bound by the essential underlying factual determination. At the outset of his report, after discussing this issue, the Master correctly concluded that with respect to discriminations the record stood that 'the wrongful acts of U. L. Co. inflicted some substantial damage upon the Gazette.' However, seemingly because of an interpretation which we could not agree with he concluded that collateral estoppel was inapplicable, and that *Partmar* [*Partmar Corp.* v. *Paramount Pictures Theatres Corp.* (1954), 347 U.S. 89] was 'dispose(d) of.' We can not agree. *The finding of substantial damage done to Gazette by U. L. Co's acts of discrimination was essential to the judgment dismissing U. L. Co's original action. This finding must remain for all purposes of the case.* The dollar amount, of course, was not found, or even that this damage was ascertainable in dollars, but that is something else." (Emphasis supplied.) (Footnotes omitted.)

The Court of Appeals in its 1960 decision had stated (284 F. 2d 582, at 587; I D.R. 619):

"In setting aside a decision in favor of Union Leader because of an erroneous ruling, we would normally remand to permit the court to determine this issue. *However, we think it has been resolved by the subsidiary findings which the court has already made.* In the

course of ruling that this method of defending itself was foreclosed, the court stated that '*in giving these discriminatory benefits, HG Co. was acting only after it had been put in peril of insolvency in the equity sense as a result of ULC's attempt to monopolize.*[15] . . . Admittedly the provocation to retaliate was great, the total number of discriminations was not shown to be large, [and] the period of the discrimination was short . . .' We cannot read the opinion without concluding that but for its belief that it was precluded from doing so the court would have found in favor of Gazette. Indeed, we believe any other finding would have been clearly erroneous.[16]'' (Emphasis supplied.)

''15. Or, as Union Leader itself states in its brief with reference to this period, 'Gazette's financial condition was such that it could not continue much longer.' '' (Footnote in original.)

''16. The practical necessity of Gazette's adjusting rates in order to maintain its position is made plain by Loeb's own testimony. He stated that 'this matter of the rates . . . goes to the very heart of any newspaper's survival.' Elsewhere he testified that a serious consequence of secret discriminatory advertising practices—once it is known that they are indulged in—is that it enables an unscrupulous advertiser to play one paper against the other. A merchant who has not been offered a special rate-cut by one paper can nonetheless tell the other that he has been, and that other, knowing the first paper does do such things, fears to disbelieve him, and must match the price in order not to lose the customer.'' (Footnote in original.)

Thus the Court of Appeals in 1960 reversed the District Judge, and—because the nature of the finding at R. 1095 made it *essential to do so—reversed without even remanding, for the reason that the Court of Appeals found H. G. Co.'s right to defend itself, under U. L. Co.'s massive illegal attacks*, was so clear and so obvious that no remand was needed in view of the tremendous impact on H. G. Co. *caused by* U. L. Co.'s illegalities, as already conclusively

found and resolved by the District Judge, when he found that, "in giving these discriminatory benefits, HG Co. was acting only after it had been put in peril of insolvency in the equity sense *as a result of* ULC's attempt to monopolize" (Ct. of App. Opinion, 284 F. 2d 582, 587; I D.R. 619). (Emphasis supplied.)

The Court of Appeals had thus ruled in 1960 that H. G. Co. was not guilty of any violation if its actions were, as the Court held they were, "intended only to resist deterioration of its own position *brought about by Union Leader's unlawful activities*" (Ct. of App. Opinion, 284 F. 2d 582, 586; I D.R. 617). (Emphasis supplied.)

The Court of Appeals, in 1964, referred to the conclusive and finally binding collateral estoppel as applying only to "The finding of substantial damage done to Gazette by *U. L. Co's acts of discrimination.*" (Emphasis supplied.) Actually, an examination of the finding of the District Court —"In giving these discriminatory benefits, Gazette was acting only after it had been put in peril of insolvency in the equity sense *as a result of Union Leader's attempt to monopolize*" (R. 1095) (emphasis supplied)—shows that the phrase "attempt to monopolize" was not limited merely to U. L. Co.'s flood of advertising discriminations, *but to all U. L. Co.'s illegal activities.* We contend, therefore, in support of the judgment of reversal, that not only was the Court of Appeals clearly correct in holding that "The finding of substantial damage done to Gazette by U. L. Co's acts of discrimination" was in fact "essential to the judgment dismissing U. L. Co's original action," but, as we argued below, indeed, *all the findings* of U. L. Co.'s numerous illegalities found by the District Court were included within the phrase "attempt to monopolize," and therefore were essential to the original judgment, and the principle of collateral estoppel now applies to these findings also. Strong support for our contention is found in

U. L. Co.'s Petition itself as well as in the Report of the Master, for at page 17, U. L. Co.'s "Third" point on the question of H. G. Co.'s actions in "*self-defense*" refers specifically to—". . . Thirdly, the master found that petitioner had damaged the Gazette to the extent of some $29,000 [single damages]." Now, the Master found (1 D.R. 201-212) the $29,000 damages were due to the illegal boycott of the Eight Merchants as to their own advertising exclusively in the Journal—and U. L. Co. thus seemingly accepts H. G. Co.'s contention that the phrase "attempt to monopolize" included *all* U. L. Co.'s illegal activities, not merely U. L. Co.'s flood of advertising discriminations.

The decision of the Court of Appeals on the law (although we believe somewhat too limited in scope, as just shown, and actually thus more favorable to petitioner than it should expect) is squarely in accord with well-settled principles laid down by this Court. *Smith* v. *Vulcan Iron Works* (1897), 165 U.S. 518. *Partmar Corp.* v. *Paramount Pictures Theatres Corp.* (1954), 347 U.S. 89. *Yates* v. *United States* (1957), 354 U.S. 298, 336. (See pp. 32 ff., *infra*).

The dismissal of U. L. Co.'s complaint as to alleged advertising discriminations by H. G. Co. (R. 13-14, 18 (par. 1)) was certainly a final judgment—nothing further remained to be tried in that respect. Rule 54,* Federal Rules

*As it stood in 1959-1960: "(b) Judgment upon multiple claims. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, *the court may direct the entry of a final judgment upon one or more but less than all of the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.* In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims." (As amended Dec. 27, 1946, effective March 19, 1948.) (Emphasis supplied.)

of Civil Procedure, 28 U.S.C. As the Court of Appeals pointed out, the District Court had made the necessary determination under Rule 54 "effective to make appealable under 28 U.S.C. § 1291," the District Court's decision "on claims finally disposed of" (333 F. 2d at 801, 803; Petition, pp. 29, 32; VIII D.R. 18; see R. 1105). See *Sears Roebuck & Co.* v. *Mackey*, 351 U.S. 427, and *Cold Metal Process Co.* v. *United Engineering & Foundry Co.*, 351 U.S. 445.

In its Petition herein, U. L. Co. also argues that "Thus the parties were assured in advance of that first trial [*i.e.*, in 1959] that they need neither advance nor meet evidence as to damages" (Petition, p. 15).

But, as the Court of Appeals pointed out, the separate trial of damages in antitrust cases is not analogous to patent-infringement cases following an appellate adjudication on issues of liability. "One cannot think of private liability for violation of the anti-trust laws except in terms of impact and damage" (Petition, p. 30; 333 F. 2d 802). *Stearns* v. *Tinker & Rasor* (C.A. 9, 1958), 252 F. 2d 589, 605-606; cert. den. 350 U.S. 830. *Freedman* v. *Philadelphia Terminals Auction Co.* (C.A. 3, 1962), 301 F. 2d 830; cert. den. 371 U.S. 829. *Foster & Kleister Co.* v. *Special Site Sign Co.* (C.C.A. 9, 1936), 85 F. 2d 742, 750; cert. den. 299 U.S. 613. *Glenn Coal Co.* v. *Dickinson Fuel Co.* (C.C.A. 4, 1934), 72 F. 2d 885, 887. *Flintkote Co.* v. *Lysfjord* (C.A. 9, 1957), 246 F. 2d 368, 392: "In other words, the *fact* of injury must first be shown before the jury is allowed to estimate the *amount of damage*." This principle was ignored by the Master (see p. 34, *infra*).

Indeed, petitioner U. L. Co.'s counsel had, in the 1960 appeal, conceded and argued that the November, 1959, trial *did* concern itself necessarily with "the fact of damage"; in other words, impact and causation, as distinct from the

exact "amount of damages." As stated in U. L. Co.'s printed brief to the Court of Appeals in 1960, p. 123:

"*E. Injury to the Haverhill Gazette Co.*

"An injury 'in his business or property' is a prerequisite to a person's right to maintain an action for treble damages for violation of the antitrust laws. *Peller* v. *International Boxing Club,* 227 F. 2d 593, 7 Cir. (1955).

"A fair degree of certainty is still essential to show the causative relation of appellant's misconduct and appellee's injury. *Momand* v. *Universal Film Exchanges,* 172 F. 2d 37, 43, 1st Cir. (1948), cert. denied 336 U.S. 967.

"Lawlor, president of H. G. Co at the time that appellee's counterclaim was filed, testified that it was open to considerable doubt as to whether the losses of H. G. Co were the cause of the strike or the cause of the competition (R. 434).

"The appellee H. G. Co has failed to show any injury to it resulting from any relationship of ULC and the union; from the fact that ULC made payments to the merchants; or from any of the advertising pricing practices of ULC which are alleged to be violations of the antitrust laws.

"The Order of September 17, 1959, [*] regarding separation of issues pursuant to Rule 42(b) applies only to 'issues of damages' as differentiated from 'injury in . . . business or property', i.e. *the amount of damages as differentiated from the fact of damage. Thus appellee, HGCo. was required to show that it was 'in fact' injured.*

"In contrast, ULC introduced evidence to show that some advertising accounts were lost as a direct result

*[R. 87.]

of the advertising practices of HG Co. (p. 30, supra); and there is ample testimony to the effect that had it not been for the intervention of NNE, ULC would have acquired HG Co. and immediate profits instead of continuing losses by the failure to acquire HGCo." . (Emphasis supplied.)

See also R. 159-160, 166; and especially R. 258-259:

"Mr. Bloomberg [U.L. Co.'s then counsel]: I think that I wasn't of the understanding that this is limited primarily and only to injunctive relief. I was of the impression that we had to show some form of damage; not necessarily in amount, but some form of damage as a result of the activities of the parties in order to have possibly even injunctive relief.

"The Court: I see. In other words, you are not saying that at this stage it is important to look with too meticulous detail at this table but merely at its general conclusion?

"Mr. Bloomberg: That is right, your Honor."

Petitioner was hardly "lulled" (Petition, p. 17) to its disadvantage, since it itself has insisted that finding "*the fact of damage*" was squarely within the order of September 17, 1959 (!)

Petitioner's next argument is to the effect that the Court of Appeals was wrong in deciding this issue in 1960. The decision was correct. See *Times-Picayune Publishing Co.* v. *United States* (1953), 345 U.S. 594, 623, where this Court said:

"[A]n unlawful trade practice may not be justified as an emulation of another's illegal plan. . . . But that factor is certainly relevant to illuminate ambiguous intent, particularly when planned injury to that other competitor is the crux of the charge."

(And see the 1960 opinion of the Court of Appeals, I D.R. 616-619; 284 F. 2d 582, 586-587.)

Further, the decision was a final judgment on this point (see pp. 28-29, *supra*); and this Court denied certiorari (see p. 4, *supra*).

Petitioner cites (Petition, pp. 18-19) *E. V. Prentice Machinery Co.* v. *Associated Plywood Mills, Inc.* (1958), 252 F. 2d 473, 476-477; cert. den. 356 U.S. 951. But in that case, in prior proceedings (a declaratory-judgment action involving certain patents), the issue was whether attorneys' fees should be awarded to the prevailing party; the District Court's finding that damage had been actually caused to such party was clearly not essential to the issue of whether there had been "unfairness or bad faith in the conduct of the losing party," which is the test for awarding counsel fees "in cases of this kind."

B.

U. L. Co.'s Other Numerous Extensive Illegal Activities (Petitioner's Points I and III).

As stated *supra* (pp. 27-28), collateral estoppel should also apply, in considering damages, to *all* U. L. Co.'s other extensive illegal activities in addition to U. L. Co.'s illegal flood of advertising discriminations.

This would then be another ground sustaining the result of reversal reached by the Court of Appeals. But, assuming the Court of Appeals was correct in not extending the scope of its ruling on collateral estoppel (and thus being more favorable to petitioner than it should have been), then we submit that the Court was certainly correct in its reasoning and rulings as to these other illegal activities, though it limited the strict estoppel to U. L. Co.'s illegal advertising discriminations, and, as to all U. L. Co.'s other illegal activities, only imposed a "burden" on the Master as indicated below.

As to U. L. Co.'s numerous other illegal activities, the Court of Appeals stated as follows (333 F. 2d at 802, 803; Petition, p. 30, 31):

> Unlike patent infringement cases, "where the issues of patent infringement and damages are separate and clear-cut," and—
>
> "Granting that an injunction may require a finding of merely threatened loss, 15 U.S.C. § 26, a partial decree on all issues of liability, however considered, implies much more. One cannot think of private liability for violation of the antitrust laws except in terms of impact and damage. . . .
>
> "Thus we have the situation of the district court's entering not merely a permanent injunction, *but a decree of liability which it labelled final, following an apparent finding of damage which, legally, would seem a necessary prerequisite.*" (Emphasis supplied.)

For "every issue of liability" was initially tried out by stipulation, and not merely "every issue pertinent to the granting or refusing of an injunction." (333 F. 2d at 801; Petition, p. 28; see R. 87.)

And, further:

> "Although we conclude that with respect to ULCo's other illegal activities the master was free to find facts overriding the court's decree of liability construed as interlocutory only, it does not follow that the present report in this regard is to be accepted. In the first place, we do not agree that the 'clearly erroneous' rule applies uniquely to the master's findings. *Rather, the prior findings of the court were themselves entitled to consideration, and there was a burden on the master to be met before finding as to any issue embraced in or underlying the earlier de-*

cree, even though interlocutory, that the court was wrong, a burden which neither he, nor the court subsequently, recognized.'' (Emphasis supplied.) (333 F. 2d at 804; Petition, p. 34; VIII D.R. 23.)

As shown *supra*, the liability findings necessarily involved findings of impact, the "fact of damage" (see pp. 29 ff., *supra*). Yet, as the Court of Appeals pointed out, the Master "indicated no awareness of any obligation, as the result of the [District] Court's prior findings to find substantial damages or even any damages," as to any of U. L. Co.'s numerous illegal activities—even as to the Eight Merchants, and actually found "none with respect to the eight merchants except as to their own exclusive use of the Journal," and actually disregarded their illegal, and "immoral" (R. 1092) activities (and see pp. 42-43, *infra*) in influencing "other enterprises" in Haverhill to advertise in the Journal (see *infra*, pp. 42-51, and in Appendix, pp. 71-72, 78-79) (333 F. 2d at 802, and footnote 5; Petition, p. 31). And, as the Court of Appeals further pointed out, a "careful study of his report" reveals that the Master understood (erroneously) that his power involved finding "damage, *if any*," or, as the District Court put it: " 'making an independent and *fresh* appraisal on factual issues of *causation and damages*' ", without any proper consideration of the previous findings (333 F. 2d at 802, 803; Petition, pp. 31, 32). (Emphasis supplied.) (See p. 33, *supra*.)

Further, the Court of Appeals then went on to point out that the Master had imposed upon H. G. Co., to the contrary, an improper standard of proof and one not in accordance with this Court's decision in *Bigelow* v. *RKO Radio Pictures, Inc.* (1946), 327 U.S. 251.

Since this is a very important part of the Court's opinion (and certainly the part as to which U. L. Co. complains strongly the most in its Petition), this part of the decision is quoted at length as follows:

"These other doubts take form because of the master's frequent use of the phrases 'sole or predominant cause,' and 'a more substantial cause of harm than any other known cause.' While he did this only in connection with rejecting, at the outset of his report, Gazette's interpretation of one particular statement in the court's opinion, and the master's ultimate conclusion was correct, his use of and reliance upon this standard of causation was wrong. *The fact that he never enunciated another strongly suggests that he may have employed the same standard throughout his report.*" (333 F. 2d at 805; Petition, p. 36; VIII D.R. 25.) (Emphasis supplied.)

The Court then stated (333 F. 2d at 805; Petition, p. 37):

"In using this standard the master purported to rely upon the decision of the district court in *Momand* v. *Universal Film Exchanges, Inc.* D. Mass., 1948, 72 F. Supp. 469, noting that the judgment had been affirmed. He failed to note, however, that 'sole or predominant' was not the rule that we stated on the appeal. Judge Goodrich, speaking for the court, returned to the Restatement and said, 172 F. 2d at 43, '[T]he usual rule in tort is that a plaintiff may recover for loss to which defendant's wrongful conduct substantially contributed, notwithstanding other factors contributed also. Restatement, Torts § 431 (1934).' The difference between a 'substantial' cause and one 'more substantial than any other' is manifest. If the master put a burden on Gazette, as it may well be he did, to eliminate *all* proper causes for the shifting of advertising from Gazette to the Journal to the *extent of affirmatively showing that the illegal causes were the sole or most substantial, we consider this too fa-*

vorable treatment of a deliberate wrongdoer. If anything is clear in this case it is that the Gazette's union difficulties in a strongly union area were what furnished ULCo the opportunity to initiate and continue the Journal. *From the outset it capitalized upon this by illegal means, purposely and effectively designed to take advertising from the Gazette.* After the strike was settled (and passing the question of whether ULCo's conduct may not have extended the date) *ULCo engaged in massive illegal assaults upon Gazette's advertisers, discussed supra which were considered, in ULCo's opinion, at least, of such extraordinary value. Certainly they, too, were expressly designed to accomplish exactly the losses which Gazette in fact suffered.* For ULCo thereafter to be able to say, 'Prove exactly what you lost and that it would not have been lost anyway,' would be to admit to a legal ineffectiveness that we should regret to contemplate. In our opinion it is enough to warrant the master in finding general damages that Gazette should show merely *a substantial cause,* rather than a cause more substantial than any other. While the master considered finding *general damages* [*i.e.*, H. G. Co.'s overall or "maximum" claim], and declined to do so, we cannot tell under what circumstances he contemplated it, and the burden he imposed upon Gazette. His reference to the principle enunciated in *Bigelow* v. *R.K.O. Radio Pictures, Inc.* 1946, 327 U.S. 251, that the risk of uncertainty should fall upon the wrongdoer, had attached to it the condition that 'the difficulties of proof (must be) . . . the result of ULC''s unlawful acts,' (which he found they were not). Particularly in the sense that he used it, this was a far too narrow reading of *Bigelow.*" (Emphasis supplied.)

Indeed—as this Court had said in the *Bigelow* case (*Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, at 265) with respect to the determination of causation:

> "*The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created.* See *Package Closure Corp.* v. *Sealright Co.*, 141 F. 2d 972, 979."

This Court then continued:

> "That principle is an ancient one, *Armory* v. *Delamirie*, 1 Strange 505, and is not restricted to proof of damage in antitrust suits, although their character is such as frequently to call for its application. In cases of collision where the offending vessel has violated regulations prescribed by statute, see *The Pennsylvania*, 19 Wall. 125, 136, and in cases of confusion of goods, *Great Southern Gas & Oil Co.* v. *Logan Natural Gas & Fuel Co.*, 155 F. 114, 115; cf. *F. W. Woolworth Co.* v. *Labor Board*, 121 F. 2d 658, 663, the wrongdoer may not object to the plaintiff's reasonable estimate of *the cause of injury and of its amount*, supported by the evidence, because not based on more accurate data which the wrongdoer's misconduct has rendered unavailable. And in cases where a wrongdoer has incorporated the subject of a plaintiff's patent or trade-mark in a single product to which the defendant has contributed other elements of value or utility, and has derived profits from the sale of the product, this Court has sustained recovery of the full amount of defendant's profits *where his own wrongful action has made it impossible for the plaintiff to show in what proportions he and the defendant have*

contributed to the profits. Westinghouse Co. v. *Wagner Mfg. Co.*, 225 U. S. 604; *Hamilton Shoe Co.* v. *Wolf Brothers*, 240 U. S. 251; see also *Sheldon* v. *Metro-Goldwyn Corp.*, 309 U. S. 390, 406." (Emphasis supplied.)

The Court of Appeals in its opinion stressed that certainly in this particular case the adoption of a rigid rule of causation would indeed be "harsh" and unjust and, as stated above, that the Court would "regret to contemplate" such adoption. As the Court further carefully analyzed the issue (footnote 16 of Opinion) (333 F. 2d at 806-807; Petition, pp. 38-39):

" 'The degree of certainty required of a plaintiff in proving causation of damage . . . varies with the nature of the case.' *Momand* v. *Universal Film Exchange, supra*, 172 F. 2d at 42 . . . A degree of uncertainty may always be permitted, especially when the circumstances make it particularly likely that the claimant suffered loss at the wrongdoer's hands. Cf. *Bigelow* v. *R. K. O. Radio Pictures, Inc.*, 1946, 327 U.S. 251 . . . *In the antitrust case at bar uncertainty of cause is much less than it would be in the ordinary multi-competitor situation because until the Journal appeared in this admittedly one-newspaper area Gazette had no competition, and if the Journal had ceased publication it would have reverted to that status. In a very arguable sense whatever the Journal took, particularly after the strike ended, Gazette lost. This is, in other words, a harsh case in which to conclude, after proof of substantial violations of the antitrust laws directed at the claimant, that there was an unsatisfied burden of showing any legal damages be-*

cause of some rigid rule of causation. The question is not primarily one of showing damage, but one of the extent of damage where there are multiple causes, none susceptible to precise measurement, which are in source independent and yet interact upon each other in producing injury. We note in the Restatement of Torts (1939), relied upon broadly in *Momand*, and by the master as well, that in a case where the damages cannot be precisely calculated because of the interaction of concurrent causes, there is no burden of excluding all other causes of loss, and that estimates based upon such evidence as is 'reasonably available' under the circumstances may be accepted. Section 912, illus. 12. See also comment to that section. In fact, *Bigelow* suggests that the burden of excluding the effect of other causes may sometimes be upon the wrongdoer (See 327 U.S. at 264). *Whether or when such a burden may be imposed is a difficult question which we find impractical to rule on without going deeply into evidentiary matters which have not been argued and which, conceivably, may not recur in the same form or context.*" (Emphasis supplied.)

The Court of Appeals further stated that, throughout his Report, the Master had therefore erroneously "charged himself":

"Furthermore, we find it difficult to agree with the court in its opinion confirming the report that the Master had not been unduly hard to convince. By this we mean that we are not satisfied that he did not charge himself erroneously. Certainly he did not vocalize our caveat in *Momand* v. *Universal Film Exchanges, Inc.*, 1 Cir., 1948 172 F. 2d 37, at 43, 42, *cert. den.* 336 U.S. 967, that while 'a fair degree of certainty is still essen-

tial to show the causative relation of defendant's misconduct and plaintiff's injury,' yet 'in an antitrust suit, covering as it must many imponderables, rigid standards of precise proof would make a plaintiff's task practically hopeless.' It is more than arguable that he did not apply it. At the least it can be said that in discussing the evidence the master gave more open consideration to ULCo's evidence and the negative aspects of Gazette's than to the more favorable features of Gazette's case." (333 F. 2d 804; Petition, pp. 34-35; VIII D.R. 23-24.)*

It seems that U. L. Co. erroneously assumes, as the Master did, that "the sole or predominant cause" (Petition, p. 15, 12 lines from bottom) is the correct test of causation here. Yet, by page 23† of its Petition, U. L. Co. has apparently switched to "A substantial cause" as the

*The following are sufficient illustration of the vast extent of some of the clear errors in this respect which pervade the entire Report. We refer to the printed Record herein:

1.	Objection 32	I D.R. 336-337
2.	Objection 37	I D.R. 338-339
3.	Objection 38	I D.R. 339-340
4.	Objection 39	I D.R. 340-341
5.	Objection 39A	I D.R. 341
6.	Objection 40	I D.R. 341-342
7.	Objection 41	I D.R. 342
8.	Objection 44	I D.R. 345
9.	Objection 45	I D.R. 345-346
10.	Objection 51	I D.R. 348
11.	Objection 52	I D.R. 348-349
12.	Objection 53	I D.R. 349
13.	Objection 54	I D.R. 349-350
14.	Objection 60	I D.R. 353
15.	Objection 62F	I D.R. 362-363.

See especially Appendices A and E to Objections. (I D.R. 364-405; I D.R. 414-416.)

†See I D.R. 232; I D.R. 360(k); I D.R. 338-339; 339-340.

test of causation, but on page 24 (see also p. 21) it is stated that H. G. Co. anyway had only produced a "mere scintella [sic] of evidence."

It is necessary, in view of petitioner's contentions, and, indeed, accusations (see *infra*), to examine the voluminous evidence (the Record as printed, filed with the Petition, containing almost 3,500 pages) in the case at least in some detail, fully to illustrate the extent to which the Master departed from the rule of the *Bigelow* case and from the proper rules of law on causation and burden of proof. This we do *infra* under "C" (pp. 45-57). (See also Appendix hereto.)

We do this, also, to demonstrate clearly that the evidence favorable to H. G. Co. was overwhelming, and in no sense "insubstantial if not entirely ephemeral" (Petition, p. 22) or a mere "scintilla"; and we do this because of U. L. Co.'s repeated and unjustified allegations and accusations (unusually strong) concerning the First Circuit Court of Appeals. These are to the effect, as alleged last July and now repeated in its Petition in another form (see *infra*), that the entire Court of Appeals for the First Circuit has so "created an atmosphere of hostility against" U. L. Co. in connection apparently with "political philosophy or advocacy of principles" of U. L. Co. (see 333 F. 2d at 808, 809-810; IX D.R. 1-4) that U. L. Co., if this Court now denies its Petition, will ask "for a change of venue to another District and Circuit" (*ibid.*). And now, in this Petition, U. L. Co. states that the Court of Appeals was acting "incredibl[y]" (Petition, p. 12), against all "fairness, law, logic and respect for a firm administration of justice" (Petition, p. 13), showing—whatever this means—that it "did not trust a man of Professor Bok's character not to resist the 'new rules'" (Petition, p. 14), with an "ambigu[ity]" (Petition, p. 13) so great, in view of the "tentative character of its opinion [that] it is impossible to tell the precise point or points" on which it reversed (Petition,

p. 20), with "manifest unfairness" (Petition, p. 17), with "sheer speculation" (Petition, p. 21), and even, again, that it is a Court "Allegedly Biased against Petitioner and its Principal Officer [Loeb]" (Heading, point IV, Petition, p. 24). Surely H. G. Co. must pay "more than passing interest" (to quote Petition, p. 23, n. 4) to such unjustified and harsh accusations (see also pp. 60-61, *infra*).

The analysis which follows demonstrates that the Master's Report was, indeed, "clearly erroneous," even if "clearly erroneous" *were* the sole test to be applied to his findings.

But, as the Court of Appeals pointed out (see p. 34 *supra*), the "clearly erroneous" test was *not* the rule applying, in the last analysis, to these findings. For there was at least a burden on the Master imposed by the liability trial, findings and judgment (see *supra*, p. 34), and, except for the testimony of many of "the 25" advertisers themselves (who were approached by the Eight Merchants), and for much testimony on the theory and details of the amount of damages, the testimony on the trial before the Master so far as impact and causation are concerned, was not, when analyzed (see pp. 45-57 (and see Appendix), *infra*) substantially different from that before Judge Wyzanski in 1959. See *Western Fire Insurance Co.* v. *University City*, 124 F. 2d 698, 699-700 (C.C.A. 8, 1942).

And, as to these 25, the pattern of the testimony of many of these merchants, as indicated below, went beyond the bounds of credibility, particularly, and above all, in light of the overriding fact, ignored completely at all times by the Master—and discreetly barely mentioned, if at all, by U. L. Co. in its Petition—of the $1,000,000 contract. As the Court of Appeals stated:

> "Nor did the master deal with the likelihood that the eight merchants did exactly what they said they did, *not merely because they were paid, collectively,*

> *some $30,000* by Loeb for so long, but because they were promised $1,000,000 and a quarter interest in the Journal if the Journal was successful in putting Gazette out of business. This truly extraordinary contract, and what might seem to be inevitable consequences, was dismissed in silence* as the Master concluded that (beyond effects on advertising of their other enterprises) the merchants' activities were *so inconsequential as not to produce a single dollar.*" (333 F. 2d at 805; Petition, pp. 35-36.) (Emphasis supplied.)

Amazingly, U. L. Co., in its Petition, refers to the Eight Merchants, paid or promised these huge benefits throughout the damage period, as "most ineffectual advertising solicitors—if indeed they solicited at all under the evidence in this case." (!) (Petition, p. 12.)

U. L. Co. stresses over and over again (*e.g.*, Petition, p. 10) that, because H. G. Co. did not call most of these 25 witnesses—and, we reiterate, for obvious reasons—an "inference" should be drawn against H. G. Co. that "their testimony would be unfavorable" to H. G. Co. But of course the witnesses *were* called—by U. L. Co.—and the cases cited on page 10 of the Petition do not of course support the proposition—which is erroneous—that, when the witness *does* testify, as a large number of the 25 did, the "inference" still remains.

Further, reference to the cases cited at that page by U. L. Co. shows that in each the missing witness was in the following categories:- Officers and agents of a distributor-party (*Interstate Circuit* v. *United States*, 306 U.S. 208, 225, 226); a brother of the party in whose car the party had been riding (*Chicago, etc. Co.* v. *Slowik*, 184 F. 2d 920

*Approximately $30,000 during the "damage period" ($20,000 yearly).

(C.A. 8, 1950)); "a surviving partner" failing to call an employee "who participated in all of [the deceased partner's] machinations" (*Stoumen* v. *Commissioner of Internal Revenue*, 208 F. 2d 903 (C.A. 3, 1953)); in other words, witnesses, never called by anyone, who were presumably under the control of a party.

Here the witnesses, to the contrary, were advertisers whom H. G. Co., and rightfully accused of receiving secret illegal advertising discriminatory benefits and "deals" from U. L. Co., or of being otherwise illegally influenced (see pp. 24 ff., *supra;* pp. 42-43, *supra;* pp. 45-51, *infra;* Appendix, pp. 71-72 and 78-81, *infra*).

Further, many of the twenty-five advertisers had concededly been given these illegal advertising discriminations by U. L. Co. in the course of what the Court of Appeals bluntly and properly termed "massive illegal assaults upon Gazette's advertisers . . . considered in U. L. Co's opinion, at least of such extraordinary value . . . [and] expressly designed to accomplish exactly the losses which Gazette in fact suffered" (333 F. 2d at 807; Petition, p. 37). These advertisers testified as to the effect on them of these discriminations—*e.g.*, Kingston (I D.R. 399): "Q. And were you grateful for receiving that [discriminatory benefit]? . . . A. *I have to answer that yes.*" (Emphasis supplied.) Or, colorfully, Arakelian (I D.R. 388): "'If I give you a lollipop, would you say, 'He's a good fellow'?"

The Master, astonishingly, found *no effect*. But, as the Court of Appeals pointed out (and aside from the question of the Master's ignoring the effect of testimony like the above), the Master was bound by collateral estoppel as to substantial damage caused by U. L. Co.'s advertising discriminations and could not completely ignore what had previously been ruled in the case in this respect, and which was now binding (see pages 24 ff., *supra*).

Yet, as pointed out by the Court of Appeals (footnote 5, Petition, p. 31; 333 F. 2d 802, 804; see p. 34, *supra*), the Master "indicated no awareness of any obligation, as the result of the [District] Court's prior findings, to find 'substantial damages' or even any damages"; and no recognition in any respect of any burden on the Master "before finding . . . that the court was wrong" (see pp. 33, 34, 42, *supra*).

Whatever burden the Master imposed upon the Gazette, it was an improper one—indeed, it appears to have been the standard, in a criminal case, of proof beyond a reasonable doubt "and, indeed, in many places beyond *any* doubt" (see, *e.g.*, I D.R. 264 (No. 6 and footnote); I D.R. 338-339). Whatever rule of causation he used, it was an improper one, as shown above. Even though the clearly erroneous rule was not "uniquely" applicable here, his findings were, in any event, clearly erroneous (see pp. 57-59, *infra*).

C.

There was Ample Support in the Record for the Reversal by the Court of Appeals of the Master's Report as "Infected by Error."

(1) *The influence of the Eight Merchants on other Haverhill merchants and the influence of the joint U. L. Co.-Labor Union visits to advertisers* (see I D.R. 364-405).

Loeb well understood that his gamble could only be successful, in a city which could only support one newspaper, where he was the newcomer, if he followed the massive "unlawful course of conduct from the moment [U. L. Co.] enters upon the scene," which was his and U. L. Co.'s unwavering and continuous policy (I D.R. 622).

He paid large bribes, and made the $1,000,000 contract with the significant—and brazen—addition of 25% of the Journal profits "*if and when the Haverhill Journal under my ownership and control, becomes the only newspaper*

published in Haverhill or its environs" (R. 1201). "The purpose and effect of the eight members of the group was both to support the Journal by securing advertising for it and to discourage advertising in the Gazette by their enterprises *and other enterprises subject to their influence*" (R. 1075). (Emphasis supplied.)

Loeb indeed admitted they *did* get "as much advertising for [him] as they possibly could" (R. 173). Katz, the ringleader of the group, walked up and down Merrimack Street, the principal business street in Haverhill, and spent at least forty hours a week to line up other advertisers (Objection 32, I D.R. 336-337)—and all this by his own admissions. The Labor Union "boys" and the Journal "boys," working together, visited *every single* advertiser in Haverhill (Tr. 662; II D.R. 1023). (See I D.R. 271, 274-276, 280, 358, and *passim* the Objections.) As President Rigazio of the Labor Union put it: "the success of the Haverhill Journal was the success of [the] strike" (II D.R. 1095, R. 914).

Now all these facts are not disputed, where the "clearly erroneous" rule, even if it were fully applicable (see p. 34, *supra;* 333 F. 2d 804; Petition, p. 34) might be operative —they are conceded or come from U. L. Co.'s "Big Eight" or U. L. Co.'s friend Rigazio,* the President of the Union. J. M. Fields, the biggest advertiser in Haverhill, in July, 1958, suddenly and dramatically switched from over 2-1 in the Gazette to 100% in the Journal after the Gazette turned down a concededly illegal contract, *and the Journal entered into* that illegal contract (IV D.R. 1743-1744), which was "the most serious discrimination" of all, the District Court found (R. 1205, 1077, 1093). J. M. Fields admitted, through its Bertram Ellis (IV D.R. 1756), that, *if*

*Cf. also, as to Labor Union Secretary Woodcock, Judge Wyzanski's comment at R. 884: "He isn't exactly a friendly witness" (*i.e.*, not friendly to H. G. Co.).

the Gazette had accepted that illegal contract offer, *the Gazette would* have gotten *all* the advertising. This again was July, 1958, which the Master admits, with perfect inconsistency to his other findings, was a most crucial period—"when the support of subscribers and advertisers might well be influenced by any indication as to which of the two papers was to prevail in their competitive struggle" (Objection No. 58, I D.R. 352-353).

The improper standard of proof used by the Master may also clearly be demonstrated by the following:

With respect to advertiser Kingston (I D.R. 349), his case is "more difficult" since there is concededly, the Master says, "some evidence of improper influence" (I D.R. 219), since Kingston "admitted knowing that Haverhill Hardware [Gordon, one of the Eight] advertised exclusively in the Journal and stated that he wanted to advertise in the same paper as his competitors so that customers could make price comparisons" (I D.R. 219). Further and "more serious" (I D.R. 219) "he had various talks with Mr. Fishbein [also one of the Big Eight] during this period concerning advertising in the Journal" (*ibid.*). Indeed, the Master specifically finds at least that Kingston suggested "Fishbein's conversations" did "help persuade him to try the Journal" though he never suggested they "did more than help" (I D.R. 220).

But what more "help" is necessary? One of the Eight, some of whom worked for Loeb forty hours a week, tirelessly walking up and down Merrimack Street, the principal business Street in Haverhill (II D.R. 711-712), helped persuade Kingston to use the Journal. There were, of course, other factors—*all* the advertisers in Haverhill were *"covered"* by the joint visits of the Labor Union "boys" and the Union Leader solicitors (II D.R. 1023), in an atmosphere in Haverhill where the Court of Appeals has said: "*But it must have already become apparent that the Jour-*

nal was in the union's picket line" (I D.R. 614). (Emphasis supplied.) Under the law, it is sufficient to assess damages if the illegal act contributed in any *substantial* way to the result (see pp. 36-41, *supra*)—for H .G. Co. to prove that one of the Eight *did* "help persuade" an advertiser illegally is surely sufficient for the assessment of damages. But never for the Master.

The far-fetched nature of the Master's reasoning may be illustrated in this connection by the fact that, since merchants Sinder, Anderson, Sutherland, Gerson, Arakelian, Lemkin and Gerros did not—they said—recall being illegally solicited by any of the Eight Merchants,* therefore, finds the Master, "I cannot but conclude that the wrongful acts of ULC had no effect upon the advertising of these merchants" (I D.R. 221-222; see I D.R. 348-349).

But the Eight Merchants who worked for Loeb *admitted* they had contacted Sinders, Lemkin, Gerros, Arakelian and Sutherland (I D.R. 414-416), and, as to Gerson, a reading of I D.R. 391-392 as to the conversations with his "cousin" Karelis, one of the Eight, where "I knew his heart was with the Journal," speaks for itself. Mr. Anderson, of W. T. Grant, had to admit that his whole advertising policy "does sound a little ridiculous perhaps" (I D.R. 399-400).

And the Eight admitted that the conversations were of this nature, *e.g.:*

> "Q. And you never discussed advertising in the Journal with Mr. Gerros? A. The conversation could have come up.
>
> "Q. Did it come up? A. It is probable." (II D.R. 720.)

*As I D.R. 364-465 when compared to I D.R. 414-416 shows, the memories of the merchants of Haverhill became strangely confused whenever the names of any of the "Big Eight" were mentioned.

And later, as to Sinders:

> "Q. I said 'boosting the Journal.' Did you? A. I may have.
>
> "Q. You may have. Who was the man from Sinders? A. Mr. Sinder." (II D.R. 824.)

And so it goes. Of course the "Big Eight" generally denied that this was "in the course of [their] duties for the Union Leader Corporation" (II D.R. 824). It was merely "boosting the Journal" (same page, II D.R. 824). Up and down Merrimack Street, spending particularly, as to ringleader Katz, "practically *all* [his] time" (!) lining up advertisers illegally for the Journal (II D.R. 712). "Hundreds" of people, advertisers and readers, were solicited in the ceaseless and assiduous "boosting" by one of the Eight alone (II D.R. 858) and regular "reports" rendered at "meetings" to Loeb (II D.R. 806; II D.R. 722-727; R. 1072, II D.R. 884-885).

Would the Eight Merchants involved in the scheme and "payoffs" as they were with Loeb and U. L. Co., in the position they were in, have admitted as much as they did if it were not so? They permitted no "deviationists" in advertising in their midst (II D.R. 884-885). The admissions of the fearful merchants whom they solicited, in that atmosphere in Haverhill, described in the former opinion of the Court of Appeals in 1960—are what the Master nonetheless found as showing "the wrongful acts of U. L. Co. had no effect upon the advertising of these merchants" (I D.R. 221-222). (See Appendix, pp. 71-84, *infra*.)

And to climax all this, by the fall of 1958 H. G. Co. had actually been put in peril of insolvency in the equity sense "*as a result of*" U. L. Co.'s illegalities (R. 1095 and the Court of Appeals Opinion, I D.R. 619). Yet the Master

said that outside of the Eight, not one single other person was ever influenced one little bit by men whose services Loeb valued at $30,000 in regular payments, and at $1,000,000 and 25% of the profits of the Journal if the Journal drove the Gazette out of Haverhill (!) And the District Court approved this finding of the Master (I D.R. 602).

Thus the Court of Appeals, re-emphasizing this important point, correctly characterized the Master's Report in this respect as follows:

> "The fact, for example, that various advertisers could not, or would not, in 1962, recall that they were importuned by union members to use the Journal and not the Gazette, received much attention, and the contrary testimony of the representatives none. Similarly, the advertisers' testimony regarding lack of contact by the eight merchants, so-called, whom the [District] court found Loeb illegally and 'immorally' [R. 1092-1093] hired to act as apparently disinterested solicitors, was emphasized to the extent of not even referring to the testimony of some of the merchants themselves that for a period of nearly twenty months they spent, individually, up to forty hours a week making such contacts. Nor did the master deal with the likelihood that the eight merchants did exactly what they said they did, not merely because they were paid, collectively, some $30,000 by Loeb for so doing, but because they were promised $1,000,000 and a quarter interest in the Journal if the Journal was successful in putting Gazette out of business. *This truly extraordinary contract, and what might seem to be inevitable consequences, was dismissal in silence* as the master concluded that (beyond effects on advertising of their own enterprises) the merchants' activities were so in-

consequential as not to produce a single dollar. While there is no obligation to discuss all of the evidence, cf. *United States* v. *Yellow Cab Co.* 1949, 338 U.S. 338, 240-42, in total this was a substantial omission, particularly in the light of what had apparently been previously credited by the court. It is also relevant in view of our doubts as to the burden the master placed upon Gazette." (333 F. 2d 805; Petition, pp. 35-36.) (Emphasis supplied.)

As the Court of Appeals pointed out in footnote 12 of its opinion (Petition, p. 36; 333 F. 2d 805):

> "No mention, either, was made of the court's finding that the result of this contract was 'to intensify . . . zeal . . . to support The Journal by securing advertising for it and to discourage advertising in The Gazette by . . . enterprises subject to their influence,' and Loeb's significant testimony. 'XQ. And they assured you they would get as much advertising business for you as they possibly could, didn't they? A. Yes. XQ. And they did that, didn't they? A. Yes.' If in this vital matter Loeb was not merely misled, but totally mistaken, we think it was at least incumbent on the master to explain his mistake." (See Appendix, *infra*, p. 72.)

(2) *The J. M. Fields situation.*

These errors as to J. M. Fields were perhaps the most important in the case (see Objections Nos. 24-27A, inclusive, I D.R. 285-334).

The Master completely ignored the decisive fact (as he does almost all such admissions throughout his Report) that Bertram Ellis, advertising manager of J. M. Fields,

admitted before the Master (IV D.R. 1743-1744; Report, I D.R. 195 ff.):

> "I felt, *in the interest of our company,* that the rate should be revised *on the basis of circulation, and inasmuch as I knew that the Gazette had been* the old established newspaper in the city, I called the representative of the Gazette down to my office *and I made him an offer of a certain rate* which I felt was fair for the circulation which they then had. They said they would take it under advisement and let me know, which they did. *They rejected my offer.*" (*N.B.:* Wisely, in view of its illegality.)
>
> "I then made the *identical offer* to the Journal, and at that time the Journal's circulation was several thousand more, *and they accepted that rate.* This agreement, which is on page 1205 of your record [R. 1205], was drawn up in the interest of J. M. Fields, *guaranteeing us a rate for two years, that in the event their circulation should rise, should double, triple or quadruple, we would still be guaranteed the same rate. The sole purpose of that contract was to guarantee us a rate for two years, in the interest of our company.*" (Emphasis supplied.)

And, before the Master, Ellis removed any possible doubt on causation as follows (IV D.R. 1756):

> "Q. So that if the Gazette had accepted your offer, the Gazette would have *got all* the J. M. Fields' advertising then? A. That is correct." (Emphasis supplied.)

This concededly illegal contract was "the most serious discrimination" found by the District Court (R. 1205, 1077, 1093).

The Court of Appeals discussed this point as follows in footnote 8 of its opinion (Petition, p. 33; 333 F. 2d 804):

> "[8] We might say, in passing, that *quite apart from the binding effect of the court's finding that Gazette was injured by U. L. Co's discriminatory conduct*, we have great difficulty in understanding how the master reached his contrary factual conclusion. To take, as one example, the J. M. Fields matter, which the [District] court has described as 'most important,' and a 'serious discrimination,' this involved, in part, a discriminatory guarantee not to raise the rate for two years, which the Master found was '*a substantial factor' in taking the business from Gazette.* The master nevertheless found no damage, not merely that he could not measure it. As an 'important' reason the master referred to the fact that the guarantee was never exercised. We do not follow the reasoning, and without going into details, we do not understand the findings. We would ask, *inter alia*, what was U. L. Co's point, on the master's analysis of giving the guarantee at all?" (Emphasis supplied.)

We may simply repeat: What, indeed?

Thus the Court pointed out that the J. M. Fields "most important" and "serious discrimination"—("the most serious discrimination") (R. 1205, 1077, 1093)—was *res judicata* and had, as above stated, "binding effect" as far as U. L. Co. was concerned—and even apart from that, the Master's findings were incomprehensible in this respect.

(3) *Irrespective of other points, the Court of Appeals was correct in its decision and result in reversing because of the Master's clear errors of law and fact, as to the Gazette's "largest" or "maximum claim."* (Point omitted by Petitioner.)

As to this the Court of Appeals stated the Master was in "clear error" in rejecting as he did that claim:

> "We turn, finally, to Gazette's largest claim, that U. L. Co is responsible for all losses caused by the Journal's very existence because the Journal was founded upon, and continued in, unlawful conduct of a most substantial nature. The master recognized this as a valid issue and defined it at the outset of the Report. [See Appendix, p. 63, *infra*,]
>
> "'(I)t is conceivable that ULC would not have entered the Haverhill market, or remained there throughout the damage period, *had it not enjoyed the benefit of its own wrongdoing.* This possibility must be explored in order to make a thorough assessment of damages, for the early departure of the Journal from Haverhill would have materially improved the position of the Gazette.' (Ital. suppl.)
>
> "*It must be clear that whether any particular unlawful conduct was instrumental in causing the Journal to enter or remain in Haverhill must be determined by the effect that it had upon Loeb, ULCo's president and policymaker.* If, in Loeb's mind, it was necessary to engage in particular acts in order to warrant remaining in business, then, in the true sense, those acts caused his being in business. This must have been so regardless of whether, in point of fact, he was correct in his appraisal. If, for example, Loeb felt that it was essential to obtain illegal assistance from the union in order to continue in business, it follows that his decision to continue, and hence his continuing, resulted from his success in accomplishing this unlawful act. The question *is not whether, viewed from hindsight, the union cooperation did him any essential, or, indeed, any material good.** The Master made this analysis at the

*Footnote 17 (in original) is discussed below, pp. 55-56.

outset, and properly addressed himself to what was Loeb's state of mind when deciding whether to enter Haverhill initially, finding, on this issue, against Gazette. He then, however, abandoned this approach, and applied a strict benefit-received rule, viewed, moreover, not *as he concluded Loeb viewed it at the time*, but *as it appeared to the master in the light of the damage testimony which he credited.* The issue, he stated, was simply whether Loeb would have stayed had he in fact not received the specific advertising benefits which Gazette had succeeded in establishing to the master's satisfaction.

"Passing the extent to which the Master erred in finding these benefits too small, *the ultimate question must be not what benefits the master found in 1963, but what Loeb thought in 1958 and 1959.* [Emphasis supplied.] Moreover, even if Loeb's appraisal of the affirmative dollar benefits received coincided exactly with the master's, it still may have been that he believed that his losses would have been greater but for his illegal activities, or persistently took an optimistic view that matters would improve, which, absent these activities, he would not have entertained. *The master's substantial misinterpretation and limitation of this issue was clear error.*" (333 F. 2d 807-808; Petition, pp. 39-41; VIII D.R. 28-30.) (Emphasis supplied.)

H. G. Co. had set forth at I D.R. 408-412, as an appendix to its Objections some of the highlights of the Loeb "cooperation" (R. 1076) with the Labor Union in Loeb's efforts to destroy the Gazette.

We would ask the Court to examine I D.R. 408-412, in considering the important footnote 17 of the Court of Appeals opinion. This footnote states:

"Launching a newspaper, as Loeb himself testified, is a very difficult undertaking particularly at Christmas. Loeb himself was surprised at his success. The fact that Gazette's printers were on strike, with Haverhill being a particularly strong union area, was certainly a significant factor. It was not a factor attributable to Loeb. *However, under these circumstances Loeb's subsequent capitalization on Gazette's union difficulties to the extent of obtaining specific unlawful union assistance* (we agree with the master in not holding UL Co responsible for the union's independent activity on a theory of conspiracy) *must have been regarded by him as highly important, if not vital, to his continuance.*" (Emphasis supplied.)

As Loeb bluntly testified:

"XQ. You know there were advertisers who didn't want to advertise in the Gazette due to the possible threats of union retaliation, don't you? A. That was certainly part of the picture.

"XQ. No question about that, is there? A. That is right.

"XQ. As a matter of fact, some of these strikers went with your advertising solicitors to various merchants, did they not? A. I have no personal knowledge of that.

"XQ. Was it ever reported to you that it was done? A. I don't recollect it. [See, however, II D.R. 1023—every advertiser in Haverhill was, Union President Rigazio admitted, "covered" in the unlawful—see 1960 Opinion of Court of Appeals, I D.R. 614—"joint" visits to them.]

"XQ. Now, after the strike was over, how many employees did you—former employees of the Gazette, did you hire on a permanent basis? A. 10 out of the

30 members of the composing room came to work for the Union Leader.

"XQ. And the day the strike was settled; a photograph of you was taken, of you greeting these former strikers who were then becoming permanently employed by the Journal? A. It was.

"XQ. And you were shown in this photograph shaking hands with them, were you not? A. With Mr. Rigazio, I think." (R. 179.)

It is indeed most noteworthy that *nowhere* in its Petition does U. L. Co. discuss this vital point. Yet, if the Court of Appeals was correct here—and we say it certainly and clearly was—then on this ground alone its entire conclusion was correct and a new trial was inescapably necessary. For, if Loeb and U. L. Co. would have abandoned Haverhill in the absence of their illegal activities, then the Gazette would, by the Master's own admission (at the very least), "have materially improved [its] position" in a "profound and positive" way (I D.R. 178, and see *infra*, p. 63). The anlysis set forth in the Appendix to this Brief (amplifying the Objection set forth at I D.R. 251-263) will, we believe, further show why U. L. Co. is so reluctant to discuss this point, even in passing.

III. The Court of Appeals was Correct in Ordering the Case, on a New Trial, to be Sent to a New Master (see pp. 13-14 of U. L. Co. Petition):

Even if the "clearly erroneous" rule were fully applicable here—and as the Court of Appeals pointed out (see p. 34, *supra*) it is not—the Master's report was in fact, as we have pointed out, "clearly erroneous."

For facts and testimony must be considered and evaluated by a Judge or Master, not from some "high threshold" of never being "easily convinced" (I D.R. 600-601), or from a lofty ivory tower in some theoretical never-never land,

but according to the standards of reality and reason, and, above all, "common sense." For "it is not mere arithmetical hance which controls our present inquiry, for the facts disputed in litigation are not random unknowns in isolated equations—they are facets of related human behavior, and the chiseling of one facet helps to mark the borders of the next." Mr. Justice Rutledge in *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 337 U.S. 656, 659. Thus, in spite of the "clearly erroneous" rule, or rather even because of it, if the Master's Report "carries its own death wound" (*id.* at 660), the Court of Appeals was not bound to follow it—and did not, and correctly so. We have pointed out that the Court of Appeals herein was correct in vacating the Master's Report as (among many other reasons) constituting (see, *e.g.*, p. 55, *supra*) such clear error.

As stated in *Krinsley* v. *United Artists Corp.*, 235 F. 2d 253, 260 (C.A. 7): "It is now well settled that a finding is clearly erroneous when '. . . although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" See *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395; *United States* v. *Oregon State Medical Society*, 343 U.S. 326, 339; *McAllister* v. *United States*, 348 U.S. 19, 20.

The Report was truly, then, "infected with error."

Hence the conclusion of the Court of Appeals' opinion was proper and correct:

> "There must be a new trial. Because of several of the matters discussed herein we find it impossible to separate what findings were *infected by error*. We accordingly vacate the report in its entirety. Furthermore, we believe that the damage issues should be submitted to a new trier. Where a trier of fact has been corrected for a number of serious errors there are

bound to be strains on a second trial, conscious or unconscious, irrelevant to the issues, and hence disruptive. One may think one was not really wrong, and hence resist, consciously or otherwise, the new rules, or, conversely, lean overbackwards. Alternatively, if one fully accepts the new principles it may be natural to overemphasize them. Because of this we have sometimes remanded a case for trial before another judge, not as a reflection on the first, but to avoid such complications. This is particularly important where a prior error related to the quantum or burden of proof. *Murray v. United States*, 1 Cir., 1962, 300 F. 2d 804; *Commissioner* v. *Young Motor Co.*, 1 Cir., 1963, 316 F. 2d 267." (Emphasis supplied.) (333 F. 2d 808; Petition, p. 41.)

It surely is not necessary, in view of all the above, further to answer U. L. Co.'s contention that the new Master would be unduly influenced in retrying the case because "the Court of Appeals did not trust" a "man of Professor Bok's caliber not to resist the 'new rules'" (Petition, p. 14); or that the Court of Appeals "admitted its inability to point out a single erroneous finding of fact" (Petition, p. 13).

IV. The Decision on the Alleged Liability of H. G. Co. and Twenty Other Defendants in 1960 may Not Now be Reexamined (Point IV of U. L. Co.'s Petition).*

U. L. Co. in its headnote on its fourth point in the phrase states: "The original finding of liability against Union

*In its stay application to Mr. Justice Goldberg, in July, 1964, U. L. Co. omitted, in specifying its "Reasons for Seeking Certiorari" (pp. 7-9), any mention of any alleged point asking this Court to reopen in some way the 1959 final judgment, adverse to U. L. Co., against all twenty-one defendants as to the alleged conspiracy, as to which this Court denied certiorari in 1961.

Leader was entered and affirmed by courts *allegedly biased against Petitioner and its principal officer . . .*" (Petition, p. 24). (See also pp. 10-11, 41-42, *supra.*)

No bias was alleged by U. L. Co. against the Court of Appeals until *after* the adverse (to U. L. Co.) decision of June 8, 1964; and the allegations of bias against the District Judge were decided in 1961 adversely to U. L. Co. on the denial of a writ of mandamus. The dismissal of the U. L. Co. complaint against all defendants in paragraph 1 of the partial final decree as to the alleged conspiracy, and the necessary certificate and determination under Rule 54 (see 28 U.S.C. § 1291), constituted a final judgment and certiorari was denied (see pp. 28-29, *supra*). U. L. Co.'s counsel, indeed, expressly disclaimed in their oral argument in January, 1964, before the Court of Appeals, bringing the other 21 original party defendants back into the case. U. L. Co. may not now have the final judgment reopened.

U. L. Co.'s discussion to the effect that the "evidence" in 1959 "showed the Gazette initiated price discriminations" and that the Court of Appeals allegedly ignored this and found the Journal initiated them, is an attempt to reargue again the evidence after a final judgment (in 1960) which held H. G. Co. did *not* engage in illegal discriminations (see pp. 24 ff., *supra*); and, in any event, U. L. Co.'s statement is not true (R. 1314-1316 (Ex. S-23-b, R. 143); IV D.R. 1706-1707). Petitioner mentions, at the very end of this Petition, that this case involves "freedom of newspaper competition, now vanishing to the point of extinction, and is thus a case of great public importance." Petitioner was found in the 1959 judgment to have engaged "in an unlawful course of conduct from the moment it appears on the scene" in Haverhill (I D.R. 622). Petitioner did not dispute the question of its illegal conduct in its 1961 Petition to this Court. (See *Irvine* v. *California*, 347

U.S. 128, 129.) That 1959 judgment, as regards U. L. Co.'s violations, "still stands and is, in our opinion, presently final" (333 F. 2d at 809). No question of such "freedom" is involved here for the wrongdoer, U. L. Co., in a case whose special facts apply only to these parties.

U. L. Co.'s point IV should be dismissed.

Conclusion.

For all the above reasons, it is respectfully submitted that the Petition for a writ of certiorari should be denied.

Respectfully submitted,

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Appendix.

Note: The following, as set forth in this Appendix, somewhat amplifies the Objection set forth at I D.R. 251-263 (see Point II, *supra*, p. 57).

The Master had refused to grant H. G. Co.'s maximum claim of over one million dollars single damages, but conceded "*it would still be possible to find that the wrongful acts of ULC were the sole or predominant cause of the Gazette's losses, but this conclusion could presumably be reached only if it were found . . . (2) that the Journal would not have entered or remained long in Haverhill had it been deprived of the benefit of its wrongful acts*" (Report, pp. 5-6, I D.R. 179). (Emphasis supplied.)

The following then appears at Report, p. 65, I D.R. 226-227:

"IV.

"The Effect of ULC'S Wrongful Acts on Loeb's Decision to Enter and Remain in Haverhill

"If the Journal had not entered or remained in Haverhill, it seems probable that the great bulk of the advertising and circulation revenues received by both papers would have accrued *solely to the Gazette*. Thus, the withdrawal of the Journal from Haverhill at any time within the damage period would have had a *profound and positive* effect upon the fortunes of the Gazette. For this reason, *it is essential* to ask whether the Journal would have entered or remained in Haverhill *but for* the advantages it accrued from ULC's wrongful acts. In answering this question, we obviously cannot make a separate inquiry for each day of the damage period. It is worthwhile, however, to consider what ULC *would have done in each of certain periods.*" (Emphasis supplied.)

The United States District Judge had stressed the importance of the question of whether the owners of Newspapers of New England, Inc., had acted reasonably in purchasing the Gazette: "The belief of NNE shareholders that the investment was commercially justified was a reasonable belief" (R. 1085-1086). But the Master held that William Loeb (and therefore U. L. Co.) (R. 1069, 1092, Opinion of Court of Appeals of Dec. 2, 1960, 284 F. 2d 582, 584, I D.R. 610, 613, and *passim*) was not bound by the "reasonable man" standard. As the Report of the Master stated (pp. 68-69, I D.R. 229-230):

> "Mr. Loeb testified that he remained in Haverhill because he felt that he could better his position through legal action against NNE and because he was determined not to yield to what he considered an 'unfair fight.' Tr. 3666-67. [VI D.R. 2836-2837.] His testimony concerning legal action is supported by the fact that he actually did bring suit, however ill-advised this action may have been. Mr. Loeb's assertion that he was unwilling to back down before the Gazette's new owners suggests that a very heavy price was paid *in the name of principle.* In fact, the price is so high that it must inevitably raise a question in the mind of the observer. It is hardly feasible to test Mr. Loeb's explanation against some hypothetical standard of reasonableness, *however, for there is no available fund of knowledge to turn to for such a standard nor can we be confident that this standard would be valid to test the motives of a man who is admittedly unorthodox in his business affairs. For me, it is enough that Mr. Loeb has remained in Haverhill for more than two years since the District Court decree in the face of losses in excess of half a million dollars per year. These losses, incurred during a period of lawful com-*

petition, lend support to Mr. Loeb's insistence that he would have stayed in Haverhill in 1959 *even if he had been forced to borrow another one or two hundred thousand dollars.* Tr. 3730. [VI D.R. 2877-2878.] *Hence,* the advertising attributable to the wrongful payments would hardly seem sufficient to have caused Mr. Loeb to leave Haverhill in 1959. *It follows that NNE is not entitled to an increase in damages based on any theory that would presuppose the Journal's premature departure from Haverhill."* (Emphasis supplied.)

Further, as to the period in late May, 1958, at the end of the strike, and following, "*The* [*sic*] question, then, is whether Mr. Loeb would have chosen to stay *but for the exclusive advertising of the eight. . . .* I would therefore infer that Mr. Loeb would have remained in Haverhill, regardless of the extra advertising from the eight merchants, *unless the loss of revenue improperly induced from these merchants would have so weakened his financial position as to make it impossible for him to continue.* There is no evidence which demonstrates that Mr. Loeb's financial position was precarious enough in this period as to make him dependent on the *rather small amounts improperly received* from the eight merchants"* (p. 67, I D.R. 228). (Emphasis supplied.)

(See also Report, pp. 69-71, I D.R. 229-231, and Objections Nos. 61B, I D.R. 353-354, and 61E, I D.R. 355-360.)

Mr. Loeb had testified that he was staying in Haverhill to oppose what he regarded as a "very serious threat" to "the freedom of the press of the United States" (VI D.R. 2876-2877; see I D.R. 406).

*But note "lucrative contracts" with the Eight. See pp. 80-81, *infra*, quoting the Master.

The legal test used by the Master to ascertain Loeb's intent is and was clearly and patently erroneous as indicated by the Court of Appeals.

In the first place, there is not a shred of evidence in the record to support the Master's finding that Loeb was "unorthodox" in his "business affairs," to quote the phrase of the Master, and certainly H. G. Co. never "admitted" the same. To the contrary, the evidence is that even his opponents testified or indicated that he was a shrewd and able businessman (*e.g.*, R. 674) (but, of course, without reference to other less desirable characteristics of his).

If there was "unorthodox" behavior, this can in no effective sense be applied to Loeb's business affairs, and his personal views are not in issue here and therefore should not have been, if they were, considered by the Master and approved by the District Judge. It was not Loeb's "unorthodoxy" that was condemned by the Court of Appeals and the District Judge, but "[his] pursu[it of] an *unlawful* course of conduct *from the moment* [he] appears on the scene . . ." (Ct. of App. Opinion, 284 F. 2d at 589; I D.R. 622). (Emphasis supplied.)

The Master's finding that Loeb was "unorthodox" is a *most crucial issue* in the entire case and is the very basis on which the very crucial and decisive and completely erroneous findings and conclusions rest. For this finding was based on an erroneous rule of law, *in that the Master assumes the very point at issue.*

As the Court of Appeals said in reversing the District Judge in the first part of the case, for assuming the very point in issue:

> "In calling this an 'unfair practice' the court assumed the point. For, as we conceive the issue, the practice was 'unfair' if conducted with an intent to monopolize, but it was fair if it was intended only to

resist deterioration of its own position brought about by Union Leader's unlawful activities" (Ct. of App. Opinion, 284 F. 2d 586; I D.R. 617).

Specifically, Loeb's course of conduct was concededly determined by his intent. Loeb's conduct and thus his intent could be "unorthodox" in any legally effective sense only if he would have stayed in Haverhill without *believing* (and we particularly italicize this word) he was gaining such benefits from his *entire* "course of unlawful conduct," a *course* of conduct already definitively ruled upon by the Court of Appeals, that it was worthwhile for him to stay on in Haverhill. But *whether* he would have so remained cannot legally depend on whether or not he was "unorthodox"—as this assumes the very point in issue—which point anyway is not his business orthodoxy, or unorthodoxy, but rather whether Loeb *believed* or *must have* believed that the benefits of his entire "course of unlawful conduct," to quote again this Court of Appeals, were bringing him such substantial results that it was well worth his while to continue that entire illegal "course of conduct," condemned by the Court of Appeals; and on whether he would, reasonably (or even unreasonably), have believed that in the absence of that conduct his losses would have been so great and his future so dark that he would have left or had to leave Haverhill. Now, whether one calls this "orthodoxy" or "unorthodoxy" is, we emphasize, legally academic and immaterial and irrelevant. The issue of "orthodoxy" or "unorthodoxy" was thus a completely and prejudicially improper issue created for the first time in this case by the Master in his Report. From the Master's Report, Loeb must have been not only "unorthodox," but, to be blunt, very unbelievably and incredibly blind indeed, to have paid the "Big Eight," as they were called (II D.R. 819-820), $20,000 a year and given them the million-dollar contract with 25%—no less—of the Journal profits "if and

when the Journal under my ownership and control, becomes the only newspaper published in Haverhill or its environs . . ." (!) (R. 1201)—all to influence in advertising their own *and "other enterprises"* (R. 1074), and yet, says the Master, they failed their purpose—and their name of the "Big Eight" (see p. 71, *infra*)—so miserably that not *one* single other merchant was ever influenced to the extent of even one dollar. Thus, according to the Master, Loeb, an experienced newspaper executive, except for their own advertising, was paying and promising entirely to no avail. (See Appendix A of Objections, I D.R. 364 ff.)

As the Court of Appeals put it (333 F. 2d 808-809; Petition, pp. 39-41), the issue was surely not, as the Master put it and the District Judge approved, whether, *"Hence,* the advertising attributable to the wrongful payments would hardly have seemed sufficient to have caused Mr. Loeb to leave Haverhill in 1959" (Report, p. 69; I D.R. 229-230). (Emphasis supplied.)

For by this process of reasoning the intent of Loeb in late 1957, 1958 and 1959 would be determined by the Master in the year 1963, not by what Loeb must or might reasonably—or even unreasonably—have believed—and again the Court of Appeals emphasized the word "belief"—was the tremendously deleterious effect on H. G. Co. and therefore the great benefit to U. L. Co. of his entire and continuous ("from the moment [U. L. Co.] appears on the scene"; Ct. of App. Opinion, 284 F. 2d 582, 589, I D.R. 622) illegal course of conduct, but rather by what the Master in 1963 found, as an alleged fact, was the very slight effect on others in reality (though we of course say quite erroneous as to this, as the effect as shown in the Record was tremendous) of Loeb's same whole illegal course of conduct—a course which had put the Gazette "in peril of insolvency in the equity sense *as a result of* Union Leader's attempt to monopolize" (Ct. of App. Opinion, 284 F. 2d 582, 587, I D.R. 619). (Emphasis supplied.)

To put it even more bluntly, the proper legal test of Loeb's intent must surely be *not* the mere gain to the Journal and loss to the Gazette of the $29,000 plus, single damages (or, as the Master also puts it most bluntly and most erroneously, "*The* question, then, is whether Mr. Loeb would have chosen to stay *but for* the exclusive advertising of the eight") (Report, p. 67; I D.R. 228) (emphasis supplied)—Rather the true test clearly is, what Loeb *did think or could well have thought, what he believed or must have believed,* was the effect of his entire series of illegal activities—that whole "unlawful course of conduct" condemned by the Court of Appeals. It certainly was what Loeb thought or could well have thought was the effect, that made Loeb keep the Journal going long enough to enable Loeb to keep making his desperate efforts to purchase the Gazette, and not what the Master finds in 1963 (Report, p. 67, I D.R. 228): ". . . it is reasonable to suppose that [Loeb] would have preferred to make the venture [*i.e.*, the Journal] a profitable one by buying the Gazette instead of simply retiring from the field." Again the Master assumed the very point in issue—for it is clear Loeb could *not* buy the Gazette and failed in all his attempts to do so (R. 1078-1079). Likewise, when the Master finds that Loeb's (U. L. Co.'s—R. 1069, 1092) unsuccessful litigation against H. G. Co. and other defendants (that is, that U. L. Co. brought an anti-trust suit though U. L. Co. itself was the only party who had violated the anti-trust laws) is a point in U. L. Co.'s favor and *against* H. G. Co.'s position on the question of Loeb's intent, this assumes again the very point at issue. That point, again and again, is that Loeb clearly *believed* that the benefits of his continuous "unlawful course of conduct from the moment [U. L. Co.] appear[ed] on the scene" (Ct. of App. Opinion, 284 F. 2d at 589; I D.R. 622) were already so great that it was worthwhile wrongfully to bring a suit (and hope for

the best result) and worthwhile to stay in Haverhill in the damage and post-damage periods in spite of U. L. Co.'s fantastic losses. And, indeed, worthwhile to hope, also, that that would happen, which the Master in fact would have caused—if his Report had not been vacated by the Court of Appeals: *i.e.*, that Loeb's gamble—which is undoubtedly what it was—in a city which could only support one newspaper (R. 1069), of engaging in a continuous "unlawful course of conduct" "from the [very] moment" U. L. Co. entered on the scene (Ct. of App. Opinion, I D.R. 622), which drove H. G. Co., as the Court of Appeals held, to the very brink, to the "peril of insolvency, in the equity sense" at the least (R. 1095, I D.R. 619), would nevertheless not result in any heavy or even substantial damages against U. L. Co. under circumstances where, in an admittedly "unique" (Report, p. 71, I D.R. 231) situation, Loeb took a "unique" and daring and desperate gamble.

Loeb further testified that he brought the suit so that he might purchase the Gazette and also so that competition might be reduced to a point where he might "commercially prevail":

> "The Master. But still, even if you had received some form of legal relief, did you feel that that might enable you to purchase the other newspaper?
>
> "The Witness: Yes, I thought it might—let us put it this way—it might reduce competition to a fair point whereby—*what I would consider a fair point*—whereby eventually we might be able to commercially prevail." (Emphasis supplied.) (VI D.R. 2877.)

But, as pointed out *supra*, the Court of Appeals held in 1960 that it was Loeb who had followed "an unlawful course

of conduct" from the very moment he entered Haverhill and that the Gazette was innocent of any wrongdoing. We therefore say that the only proper inference for the Master to draw was that Loeb's reference to "reducing competition" to "what I would consider a fair point—whereby eventually we might be able to commercially prevail" meant, of course, that he stayed in Haverhill, not as a fair, clean fighter waiting for the day of commercial victory, but rather stayed because he *believed* that the benefits of that entire "unlawful course of conduct" would bring him the palm of victory—*i.e.*, the Journal alone would survive. *At the very least the Master should have considered the point.*

The Master was careful to limit his assumptions, as to 1959, to Loeb's borrowing another "*one* or *two* hundred thousand dollars" (Report, p. 69, I D.R. 229). Beyond that the Master did not go. But, again, he assumed the point in issue: For Loeb *believed* or must have believed his benefits *already* received and to be received were vast —and believed what is patent, that, even after an injunction, all advertisers whom he *believed* illegally influenced do not *ipso facto* at once shift back to the Gazette. Thus the finding is without significance.

But the District Judge found that the Eight Merchants, popularly known in Haverhill as "The Big Eight" (II D.R. 819-820) (Fishbein),* were lined up by Loeb, paid $20,000

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*"Q. By the way, this group was called various names in Haverhill, wasn't it? A. Yes.

"Q. And one of the names—

"Mr. Malloy. Is that material to this case, what the names were?

"Mr. Robert Goldman. I think it is, the names they were known among the advertisers and among the public, I think it is material, your Honor.

"The Master. Go ahead.

"Q. Was the Big Eight one of the names? A. Yes, that was one of the names.

"Q. Were there any other names? A. I don't recall."

a year and given the million-dollar contract, not only to influence their own advertising, but, as the Judge put it, "U. L. Co. offered to pay $50.00 per week to each of the eight who had in the previous week *successfully* induced his enterprise *and other enterprises* not to advertise in the Gazette" (R. 1074). (Emphasis supplied.) Yet the Master found, ignoring the "successfully" *and indeed omitting the reference to "other enterprises"** by employing marks of elision (. . .) (see pp. 78-79, *infra*), that not even one other advertiser was ever influenced by the eight—*yet Loeb could not possibly have known this in 1958 and 1959 (even if it were the fact, which it is not), as admitted by Loeb.*

This can clearly be proved by Loeb's own admissions and Martin Bendetson's (one of the Eight) own admission. Thus the Master finds that the "Big 8" did not influence one single other advertiser, outside of themselves. But Loeb *believed—just the opposite,* as clearly proved by R. 173—

> "XQ. And they [the Big Eight] assured you they would get as much advertising business for you as they possibly could, didn't they.
>
> "A. Yes.
>
> "XQ. *And they did that didn't they?* [Emphasis supplied.]
>
> "A. Yes." (See 333 F. 2d 805; Petition, p. 36, n. 12.)

But the Master, with completely erroneous hindsight, finds in 1963 that no one *in actual fact* was ever influenced even one little bit, even that merchant who admitted he received "lollipops" (*i.e.,* illegal discriminations) from the

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*I.e., The "25 advertisers" and others.

Journal and bluntly asked: "If you're spending $20 and you're going to get $20 tomorrow, and you're not paying for it, I think its a lollipop. Wouldn't you? Let's face it. I'm asking you." "The Witness. *If I give you a lollipop, would you say, 'He's a good fellow?'* " (V D.R. 2600, 2599; see I D.R. 388-389).

As throughout the Report, this admission of Loeb's as to the *other advertisers,* quoted just above, is uniformly ignored and never mentioned by the Master. The Master went further than merely ignoring it. He used marks of elision (. . .) (see pp. 78-79, *infra*).

And as to J. M. Fields, the largest and most important advertiser in Haverhill (R. 1093) and as such a most decisive and crucial issue before the Master (see p. 51 ff., *supra*), the Master did not even refer to the Big Eight's influence in switching J. M. Fields from the Gazette to the Journal. But Mr. Martin Bendetson, who was in regular meetings with Loeb and reported on everything that went on with respect to the solicitation of advertisers by the Big Eight (R. 1072), admitted bluntly at R. 799 as to whether the Big Eight were responsible for "all" (R. 799) of the advertising of J. M. Fields switching from the Gazette to the Journal: "Q. Would you or any of your group to your knowledge have anything to do with that? A. *Maybe, yes.*" (Emphasis supplied.) (See also II D.R. 848-849.)

Again, this is never referred to by the Master in his lengthy Report.

Loeb could not possibly have known or believed that the joint visits of the Union and U. L. Co. people did not in fact influence a single advertiser, when Rigazio, the President of the Union, who was in constant contact with Loeb, admitted that every single advertiser in Haver-*

*We contended, of course, that these are clearly erroneous Report findings, and the Court of Appeals agreed.

hill was contacted in those visits (II D.R. 1023). *Every single advertiser was "covered"!*

This was only one fatal and decisive error in the Master's Report, and therefore in the Judgment of June 10, 1963. For Loeb, whatever his losses in the damage and post-damage period, must reasonably—or even in an "unorthodox" fashion—have assumed that all was lost for U. L. Co. in Haverhill if he did not continue his illegal course of conduct, and that the losses could have even doubled or tripled otherwise. At the very least it was incumbent on the Master, and therefore on the District Judge, to make use of *this test* of Loeb's intent, not the clearly erroneous standard of the $29,000 1963 "finding" used and referred to above.

For Loeb, without the great benefit of the Master's hindsight, had a quite different view at the beginning of what he was accomplishing, as Loeb stated:

> "Q. Did you make any commitment for starting a daily paper at that time?
>
> "A. I said I never heard of anybody starting a daily paper in a week's time, let alone at Christmastime: *that I thought this was a very difficult undertaking and that I thought probably couldn't be done.*" (R. 125; see VI D.R. 3009.)* (Emphasis supplied.)

But with the Eight's energetic help and the strikers' he did. The joint visits worked; the distributions of the paper by the strikers in a Union town worked:

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*We say, as an admission against interest, "in the pending case" (Leach & McNaughton, Massachusetts Evidence, p. 60) and "which concerns the witness-party's motives, intentions, or knowledge" (*id.* at 61), U. L. Co. is conclusively bound in *this* case by this frank admission.

"I thought, furthermore, that this merchant support, *about which I was very skeptical in the beginning,* but which was evidenced in the very substantial advertising in the first two free shoppers, *and as I sized up the character of these merchants, I thought I would get their advertising support.*" (Emphasis supplied.) (As he did indeed correctly size up their "character" and that "support.") (R. 129; VI D.R. 2850.)

"However, I was prepared to retreat had my first week's paid circulation been one thousand or two thousand: *I would have thought I wasn't wanted and gone home.* But when we had over 9500 paid circulation in the first week period I thought here were people who seemed to want a competing paper, and merchants who obviously do, so that is the reason why I went ahead."* (R. 129; VI D.R. 2850.) (Emphasis supplied.) (Or, in other words, retreat, and no Journal unless the illegal joint visits and other typical illegal activities worked.)

And Loeb, indeed, thought his illegalities might *bring* him a profit, *i.e.*, there would be *no* Gazette (since by hypothesis there would be no Gazette if the Journal was profitable):

"Q. Yes. A. I did. I thought it could bring a profit. I thought it would take an initial two or three months, but I thought it could." (R. 129.)

Further, Loeb's hasty entrance into the Haverhill area newspaper field, without investigation, as shown above, is confirmed by other evidence. *The entrance was indeed highly unusual* (III D.R. 1535-1537).

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*See footnote, p. 74, *supra*.

As the Master concedes (Report, p. 68, I D.R. 229), "the Journal's heavy losses persisted placing burdens on Mr. Loeb which were to make imperative a loan of 300,000 dollars from Mr. Cymrot in May of 1959"; or, as Mr. Loeb bluntly put it:

> "Q. With respect to your need for the money at that time, what were the conditions? A. *Drastic.*
>
> "Q. If the money had not been obtained from Mr. Cymrot at that time, what would have happened with respect to the continuation of the Haverhill Journal? . . .
>
> "The Witness [Loeb]: *We would have to cease publication.*
>
> "Mr. Groden: Cease publication of the Journal.
>
> "Q. And at that time—
>
> "Mr. Groden: The Haverhill Journal?
>
> "The Witness: Yes." (R. 250.)
>
> "Q. As a matter of fact you were desperate for money on each occasion, *the corporation was desperate,* was it not? A. Yes." (R. 250.) (Emphasis supplied.)

With the consistency, or rather the inconsistency, that he shows throughout the Report, the Master regards Loeb's throwing down the drain well over $1,000,000 in 1960 and 1961, the post-damage period, as a strong point *in his favor* on the question of his intent!

The Master states: "These losses [over $1,000,000 in 1960 and 1961—see VII D.R. X-68 to X-71*], incurred during a period of lawful competition, lend support to Mr. Loeb's insistence that he would have stayed in Haverhill in 1959 even if he had been forced to borrow another one or

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*See second footnote, p. 7, *supra*.

two hundred thousand dollars." (Report, pp. 8-9, I D.R. 229).

Again the Master assumes the very point at issue. The competition was not "lawful" if the throwing away of these huge sums was done in the belief that the gains already accomplished by the illegal activities would be sufficient to enable U. L. Co., in spite of everything, to stay in Haverhill.

He ignores the District Court's ruling in paragraph 19 of its Opinion (R. 1096):

> "Had the losses been so extraordinary as to be unrecoverable, it might be persuasively argued that the object of the reduction was not to capture the market for its possible profit value to the one foreseeable successful competitor, but was rather to inflict injury on a rival regardless of the expectation of ultimate profit." (See schedules 19 and 20, VII D.R. X-68 to X-71.) (See second footnote, p. 7, *supra*.)

If the losses reached the stage in 1960 and 1961 where they became ridiculous, as they did, the Master should also have considered the question of the *legality* of Loeb's staying and suffering such losses and whether the purpose of such losses was to inflict harm on the Gazette. If this was the case, and we say it clearly was, Loeb's suffering these huge losses cannot be used as a reason in *his favor* on the question of his intent.

Under all the *admitted and those undisputed and those uncontradicted facts*, and in view of everything stated above, the Master's findings and startling omissions to find, as to Loeb's intent, are, as indicated by the Court of Appeals, both incomprehensible and erroneous and clearly erroneous.

But, indeed, the Master has in fact dramatically recognized this very principle, *as to Loeb's belief*, on the ques-

tion of Loeb's intent, as set forth *supra* by H. G. Co.—in his Report—but, amazingly and inconsistently, never applies it beyond the 8 merchants. For, at page 36 of his Report (I D.R. 203-204), the Master states:

> "I reach a *different* conclusion with respect to the advertising of these merchants after the termination of the strike. At this point, one potent reason for favoring the Journal was removed *and advertisers who had shunned the Gazette began to resume advertising in that paper.* At the same time, Mr. Loeb detected a 'slackening of enthusiasm' among the merchants, R. 1073, and initiated weekly payments which were found to be 'in consideration of each individual's services in inducing the enterprise with which he was concerned . . . to advertise exclusively in the Journal and to refrain from advertising in the Gazette.' R. 1092. *Thus, Loeb at least must have believed that the unlawful payments were necessary to prevent a switch in the advertising of these concerns, and he was surely in a good position to gauge the intentions of the eight.* Furthermore, *after the District Court decision, when the payments ceased, all but one of these concerns began to advertise substantially in the Gazette.*" (Emphasis supplied.)

But, as indicated *supra*, the Master goes so far as to put *three dots* after the phrase "in inducing the enterprise with which he was concerned"—the very important words left out (and why they were left out is most difficult for H. G. Co. to understand) are "*and such other enterprises* [*i.e.*, the "25 advertisers" and others—see p. 8, *supra*] *as he could influence*" (italics replacing the words omitted by the Master by his use of marks of elision), which Loeb *believed*

he admitted *they had done:* "XQ. And they did that didn't they? A. Yes" (R. 173). The Court of Appeals noted the significant omission of the Master to consider or discuss this (333 F. 2d at 805; Petition, p. 36, n. 12). Then the Master admits: "Thus Loeb *at least must have believed* that the unlawful payments were necessary to prevent a switch in the advertising of these concerns, and he was surely in a good position to gauge the intentions of the eight" (I D.R. 203). (Emphasis supplied.) He was indeed "in a good position" to gauge their intentions—and he, Loeb, knew their "intentions" *also, and his own belief,* involved the omitted words italicized above, and omitted by the use of marks of elision by the Master. He knew, indeed, the District Judge had also found (R. 1092):

> "13. Moreover, another path of reasoning leads to the same conclusion. ULC's payment to the eight for their solicitation of outsiders to advertise in The Journal without disclosing to those outsiders that the eight were not disinterested fellow advertisers as they purported to be, but were paid employees of The Journal, was an unfair practice not honestly industrial. It is misleading and immoral for a producer to pay a secret commission to an allegedly disinterested person for boosting the sale of a product which that person recommends under the purported guise of a friend or skilled neutral adviser. The use of such an unfair practice by one of two competitors in a narrow market was not honestly industrial, was evidence of ULC's exclusionary intent, and was proof of ULC's attempt to monopolize in violation of § 2 of the Sherman Act."

And at 1074:

> "While there may not have been in a technical sense a series of unilateral oral contracts in which ULC

offered to pay $50 each week to each of the eight who had in the previous week *successfully* induced his enterprise *and other enterprises* not to advertise in the Gazette, the $50 weekly payment was intended by Loeb to have, and did have, an effect indistinguishable from such a series of unilateral oral contracts." (Emphasis supplied.)

Thus the Master recognizes that the correct test of Loeb's intent was, as the Master puts it, what he *"at least" "believed"*—and *not* what is found by the Master's (and clearly erroneous in any event) hindsight (as he assumes, as shown above, the very point at issue), many years later, in 1963, to be the actual "fact"—*i.e.*, that not one single advertiser, even J. M. Fields ("the most serious discrimination"—R. 1093), was in "fact" influenced by any of the Eight. But, and this is the whole point, Loeb "must have believed" "at least"—to use the Master's own words—just the opposite, *i.e.*, that a host of others *were* illegally influenced, and that, of course, explains the $20,000-a-year payment to, and the $1,000,000 contract with, the Eight, with 25 per cent of the future profits thrown in. *"At least,"* says the Master, Loeb *"must have believed."* And, if this *"at least"* includes, by supplying the words of Judge Wyzanski, significantly omitted by the use of three dots (*and not once, but twice*—see Report, pp. 36, 38, I D.R. 203, 205), *i.e.*, *"other enterprises,"* then the entire basis of the Master's clearly erroneous findings and conclusions as to Loeb's intent was surely correctly overturned as "infected with error" (see pp. 57-59, *supra*).

Astonishingly, though, the Master again correctly found it, two pages later (Report, p. 38, I D.R. 205), to be "likewise *clear*" (emphasis supplied) that "Katz and Shoreman were members of the group to whom Loeb felt impelled

to give *lucrative contracts* in order to induce the recipients 'to support the Journal' and 'to discourage advertising in the Gazette by their enterprises . . .' " (quoting R. 1075). Yet the Master felt compelled *for the second time in three pages* to use the marks of elision to omit the key finding and ruling of Judge Wyzanski: *"and other enterprises subject to their influence."* (*Italicized words replacing the words omitted by the Master by his use of marks of elision.*)* Why?

The Master continued (I D.R. 205): "The evidence also shows that the other six merchants in the group, who are rather similar in attitude and circumstances to Katz and Shoreman, demonstrated a desire to use *both* papers *when given a free and uncoerced choice in the matter.*" (Emphasis supplied.) Uncoerced by whom? Again, by Loeb and U. L. Co. The Master then goes on to award damages based on a formula based on Gazette circulation as contrasted to Journal circulation, for the Eight Merchants' own boycott of the Gazette.

But the same "coercion," to use the Master's phrase, is obviously also true of the twenty-five merchants, the "other enterprises," whom the Master *completely ignores* in this respect (see Objections 35, 36, 37, 44, 52, 53, and elsewhere, I D.R. 337, 338, 338-339, 345, 348-349, 349; see *supra*, pp. 40 *ff.*). Surely the evidence as a whole shows the Big Eight were not unique in Haverhill in this respect. And surely the finding four pages further on at page 42 of the Report (I D.R. 208), referring to the whole damage period (Dec. 1957-Sept. 15, 1959) as one in which "*the support of subscribers and advertisers might well be influenced by any indication as to which of the two papers was to prevail in their competitive struggle,*" must apply to

*So patent were these violations of Loeb as to the Eight that the Court of Appeals said (in 1960): "We confess an inability to understand the basis of the Union Leader's appeal on this question" (I D.R. 615).

the most vital ("The most serious discrimination"—Wyzanski, D.J., at R. 1093) switchover of J. M. Fields from favoring the *Gazette* over 2 to 1—to 100 per cent in the *Journal* up to the end of the post-damage period (Dec. 1961). This was frankly admitted in his testimony by Ellis of J. M. Fields to be *because of* the illegal contract accepted by the Journal and refused by the Gazette, *as a result of which* the Journal got "all" the advertising (see pp. 51 ff., *supra*). It must also apply to the twenty-five advertisers and those on schedules 12* and 15A. And it must also apply to the fact that the "Big Eight"—and the name is significant—were 100% in the Journal, and everyone in Haverhill, of course, knew it.

Again, as to Loeb's *belief: Loeb believed, or must have believed*, that to offer a flood of advertising discriminations would effectively help to smash the Gazette. The Court of Appeals had already in effect indicated this specifically (see note 16 of the Court of Appeals 1960 Opinion, 284 F. 2d 582, 587, I D.R. 619), and clearly indicated the general overall damage in advertising to the Gazette from this huge number of discriminations and the fact that, in this type of situation, the advertiser will *not* admit illegal influence:

> "The practical necessity of Gazette's adjusting rates in order to maintain its position *is made plain by Loeb's own testimony.* He stated that 'this matter of the rates . . . *goes to the very heart of any newspaper's survival.*' Elsewhere he testified that a *serious consequence* of secret discriminatory advertising practices—once it is known that they are indulged in—is that it enables an unscrupulous advertiser to play one paper against the other. *A merchant who had not*

*H. G. Co.'s exhibits before the Master, same number, I D.R. 79-81, as amended, I D.R. 138, 160, 163; VII D.R. X-32 to X-33, X-36 to X-43, X-44 to X-46. (See second footnote, *supra*, p. 7.)

been offered a special rate-cut by one paper can nonetheless tell the other that he has been, and that other, knowing the first paper does do such things, fears to disbelieve him, and must match the price in order not to lose the customer." (Emphasis supplied.)

This quote is very important in considering J. M. Fields, which got "*the most serious discrimination*" (R. 1093); and what other effect could one possibly find Loeb *believed* this had on the advertisers on Schedule 15 when they saw the biggest Haverhill advertiser switch, not 10 or 50 or 80 per cent, but suddenly and dramatically, *100 per cent* to the Journal early in the most crucial month of July, 1958, shortly after the end of the strike, during the period when "the support of subscribers and advertisers might well be influenced by any indication as to which of the two papers was to prevail in this competitive struggle" (see p. 81, *supra*). Was this not why Loeb so eagerly pursued Fields? Of course it was, and no other inference can reasonably be drawn (III D.R. 1572). Why is this finding, correct as to the "Big Eight," completely "tightly compartmentalized" (see *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 698-699) (see 333 F. 2d at 801; Petition, p. 28), and ignored every place else in the Report?

As for the fact that the merchants knew of the discriminatory rate cutting of U. L. Co. see the testimony of one who should be an expert on the subject—Mr. Loeb—as referred to also by the Court of Appeals:

"Q. In a competitive situation where two newspapers such as here are fighting for advertising and circulation, what effect does it have if a newspaper cuts its rates or changes rates without making the

announcement public? . . . A. It gives the advertisers an opportunity to play one paper against the other by asserting to *either paper* that the other has cut their rates and since the standard is presumably abandoned, *both advertising staffs* speculate as to who is telling the truth *and who isn't and how much.*" (R. 147.) (Emphasis supplied.) (See Court of Appeals Opinion footnote 16, I D.R. 619.)

As Loeb coolly and bluntly admitted, the purpose of the whole series of discriminations was: "Q. *To increase the advertising and the circulation of the Journal?* A. *Of course*" (IV D.R. 1706-1707). (Emphasis supplied.)

Thus, again, it is surely clear that the Court of Appeals was correct in pointing out how patently and clearly erroneous are the findings and conclusions of the Master, and as approved by the District Court, not only on the question of Loeb's intent, but also necessarily (see pp. 53-55, *supra*) on the whole damage issue.

H. G. Co. thus correctly objected to the Master's findings, rulings and conclusions as to Loeb's motivations as approved by the District Court (Report, pp. 69-71, I D.R. 229-231) (I D.R. 598-604—but never discussing this point) in that, in the light of the entire record, and from Loeb's own testimony, the same findings, rulings and conclusions were against the evidence and the weight of the evidence and are erroneous and clearly erroneous, and as shown by Appendix B annexed to H. G. Co.'s Objections (I D.R. 406); and Loeb's motivations, and other key findings as shown above, were all considered as isolated, fragmentalized and compartmentalized from all the other illegal acts of Loeb's and U. L. Co.'s whole illegal course of conduct, and in particular all the acts discussed at greater length in other parts of respondent's Brief herein, *supra*, including the

joint efforts and co-operation with the Union strikers, assisting as they did the establishment of the Journal in a city with many Union sympathizers, where it was "apparent" to all "that the Journal was in the Union's picket line (Ct. of App. Opinion of 1960, footnote 6, 284 F. 2d, at 584-585, I D.R. 614), where every advertiser was jointly "covered" at a most crucial time (Tr. June 12, Tr. 662, III D.R. 1023), where constant acts of "cooperation" with the Labor Union to crush the Gazette (R. 1076) took place, where a flood of advertising discriminations took place (R. 1077, 1093) (Schedules, Exhibits) 12 and 15 and 15A, and the long list of advertisers on Exhibit 45 (see also Ex. S-23-b, R. 1314-1316, R. 143), (VII D.R. X-32 to X-33, X-36 to X-43, X-44 to X-46,* X-271 to X-272, IV D.R. 2102), the illegal payments and contracts with the Eight Merchants (R. 1092-1093), "the most serious discrimination" to J. M. Fields, the largest advertiser in Haverhill (R. 1077, 1093), and a constant pursuit of a constant and unceasing "unlawful course of conduct" (I D.R. 622). Even with the full benefits which Loeb was receiving, the "lollipops" (see p. 44, *supra*) he got and gave, he unequivocally, for once, absolutely admitted he would have had to abandon Haverhill except for a $300,00 loan from his own lawyer Cymrot (R. 250), Loeb knowing all the time only one paper would survive in the market. And yet the Master found that the absence of this flood of illegal activities would not at all have affected his entrance into Haverhill or his decision to remain there! By ignoring the question of Loeb's *belief*, and concentrating on what he found to be "the fact" years later, *i.e.*, that only the "Big Eight" themselves were, and, indeed, for merely a limited period, influenced, the Master—as pointed out by the Court of Appeals (*supra*, pp. 53-55)—

*See second footnote, p. 7, *supra*.

committed the most serious and clear error, as did the District Judge, in "adopting" this erroneous test.

It should, we believe, now be clear why U. L. Co. carefully avoids this point in its Petition; and why, aside from all other points, the result reached by the Court of Appeals herein—a reversal of the Report as "infected with error"—was necessarily correct. As the Court of Appeals most significantly pointed out on this issue (333 F. 2d 807, footnote 17; Petition, p. 40): ". . . Loeb's subsequent capitalization on Gazette's union difficulties to the extent of obtaining specific unlawful union assistance . . . *must have been regarded by him as highly important, if not vital, to his continuance* [in Haverhill]." (Emphasis supplied.)

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FILED
NOV 12 1964
JOHN F. DAVIS, CLERK

In the
Supreme Court of the United States

October Term, 1964

No. 502

UNION LEADER CORPORATION,
PETITIONER,

v.

THE HAVERHILL GAZETTE COMPANY,
RESPONDENT.

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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THE HAVERHILL GAZETTE COMPANY,
RESPONDENT.

PETITIONER'S REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent's Brief in Opposition (pp. 13, 19-24) emphasises that the judgment appealed from is interlocutory in nature and therefore not ripe for appeal.

Petitioner, at page 24 of its instant petition, recognized that its prior petition (No. 658, October Term 1960) may have been denied because the case was not then ripe for appeal, and stated:

> Even if the posture is not now ripe, the judicial history of this litigation, in which petitioner has yet to receive that equal justice under the law to which all

are entitled, dictates that this Court at this time intervene and determine the real issue.

Petitioner repeats its plea for immediate review, even if this Court should consider the judgment appealed from interlocutory. Authority for our request is abundant, where the case is as unusual and exceptional as the facts before this Court manifest.

Respondent has conceded, as it must in view of the pertinent statutory provisions, that this Court has full discretion to grant certiorari even though the judgment of the Court of Appeals is not final. See Title 28, U.S.C.A. § 1254.

This Court has granted certiorari at interlocutory stages of proceedings where the opinion of the Court of Appeals involved is in conflict with decisions of other circuits. *Myers* v. *Bethlehem Corp.*, 303 U.S. 41, 44; *United States* v. *General Motors Corp.*, 323 U.S. 373. As we have pointed out in the petition for a writ of certiorari (pp. 18-20), the opinion of the Court of Appeals here is squarely in conflict with the opinion of the Ninth Circuit in *E. V. Prentice Machine Co.* v. *Associated Plywood Mills, Inc.*, 252 F.2d 473, on the questions of collateral estoppel and the validity of findings of triers of fact.

Another ground which this Court relies on for granting certiorari is a conflict between its decisions and that of the Court of Appeals. *Heflin* v. *United States*, 358 U.S. 415, 417; *Radiant Burners* v. *Peoples Gas Co.*, 364 U.S. 656, 659. The opinion of the Court of Appeals sought to be reviewed conflicts on the collateral estoppel doctrine with such decisions of this Court as *Commissioner* v. *Sunnen*, 333 U.S. 591, 597-598 and *Yates* v. *United States*, 354 U.S. 298, 336.

This Court has granted certiorari where an appellate court has invaded a jury's province. *Gallick* v. *Baltimore & Ohio Railroad Co.*, 372 U.S. 108. Here the Court of Ap-

peals has assumed the functions of the Special Master, the trier of fact.

Upon the foregoing considerations and for the reasons reviewed in the petition, a writ of certiorari should be granted.

Moreover, this protracted case will be finally disposed of if this Court grants certiorari limited to grounds I through III of the petition and thereafter reverses the judgment of the Court of Appeals. Then the findings of the Special Master as incorporated into the judgment of the District Court will prevail and be finally dispositive of the entire case. That circumstance is a recognized reason for granting the writ: *Federal Trade Commission* v. *Standard Oil Co.*, 355 U.S. 396, 398.

If this Court also grants certiorari as to petition ground IV and reinstates the liability judgment originally entered against respondent Gazette, the only question then remaining would be the dollar amount of damages caused by respondent Gazette to petitioner Union Leader.

Respectfully submitted,

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Office-Supreme Court, U.S.
FILED
DEC 31 1964
JOHN F. DAVIS, CLERK

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PETITION FOR REHEARING OF DENIAL OF PETITION FOR WRIT OF CERTIORARI

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

This Court denied the petition of Union Leader Corporation for a Writ of Certiorari to the Court of Appeals for the First Circuit on December 7, 1964.

The judgment of the Court of Appeals sought to be reviewed reversed the judgment of the United States District Court for the District of Massachusetts on the apparent factual ground that the damages awarded were inadequate. In reaching that decision, the Court of Appeals intruded in the fact-finding field of the District Court and the Special Master whose report the District Court had

adopted. Moreover, the Court of Appeals excused the counterclaimant from observing the requisite burden of proof and it misapplied the collateral estoppel doctrine to the previously entered injunction.

In the petition for certiorari, we pointed out that on both the burden of proof and the collateral estoppel issues the opinion of the Court of Appeals was clearly in conflict with that of the Court of Appeals for the Ninth Circuit in *E.V. Prentice Machine Co.* v. *Associated Plywood Mills, Inc.*, 252 F. 2d 473, cert. den. 356 U.S. 951. Moreover, on the collateral estoppel issue, we showed clear conflict between the opinion of the Court of Appeals and decisions of this Court, such as *Commissioner* v. *Sunnen*, 333 U.S. 591 and *Yates* v. *United States*, 354 U.S. 298.

As to the error of the Court of Appeals in usurping the fact-finding prerogative of the District Court, we cited a conflict with the opinion of this Court in *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680.

After the petition for certiorari was filed, this Court, on October 26, 1964, granted certiorari in *Susser* v. *Carvel Corporation*, No. 355, October Term, 1964. An issue raised in that case is whether an appellate court, in this instance the Supreme Court, should review findings of fact made by the trial court. See brief of respondent Eagle Cone Corporation in opposition to certiorari, page 5.

If this Court in *Susser* should rule that it lacks the power to review the facts found by the trial court, *a fortiori*, the Court of Appeals in the instant case lacked the power, and committed reversible error by excercising it.

The public importance of this case, involving competition between petitioner's Journal and counterclaimant's Gazette in what the District Court and the Court of Appeals style as a "life and death struggle", requires immediate review by this Court in order to insure a fair fight. The Journal, under injunction and carrying on a holding operation

pending final judicial determination of the rights of the participants, is operating at a competitive disadvantage. This is due to the two erroneous decisions of the Court of Appeals, one on liability and one on damages.

The irony of the situation is that petitioner instituted this antitrust action. In doing so, it sought to protect itself against a combination of publishers whose objective was to prevent petitioner from introducing competition in their individual monopoly situations. Also in doing so, it acted as an adjunct to the United States Department of Justice in enforcing the antitrust laws.

Not only was petitioner thwarted in its objective, but the shield of antitrust law which it raised for its protection was, by the erroneous rulings of the Court of Appeals, turned into a sword against it.

Petitioner recognizes that a petition for rehearing is a desperate measure, but it is compelled to take it because, in this litigation, the very survival of its newspaper is at stake.

Conclusion

For the foregoing reasons, in addition to those stated in the petition, a writ of certiorari should be granted.

Respectfully submitted.

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Certificate

I, James M. Malloy, one of counsel for petitioner, hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay; and that the petition is restricted to a substantial ground available to petitioner but not previously presented and to an intervening circumstance of substantial effect.

(s) James M. Malloy
Attorney for Petitioner